FILED

No. 981479 JAN 12 1999

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IN THE

Supreme Court of the United States

October Term, 1998

JEROME B. ROSENTHAL

Petitioner [Defendant]

v.

ROBERT NOLAN CONRAD, and
ROBERT NOLAN CONRAD, A LAW
CORPORATION

Respondents [Plaintiffs]

On Petition For A Writ of Certiorari
To The Court of Appeal of California
Second Appellate District

PETITION FOR WRIT OF CERTIORARI

JEROME B. ROSENTHAL, Petitioner
125 South Crescent Drive #6
Beverly Hills, California 90212
[310] 276-9673
Petitioner, PRO SE

2518

Questions Presented

1. Whether the Federal and / or State constitutional doctrines of the "Separation of Powers" prevent judicial action which is contrary to statute's(s') plain meaning.

2. Whether, and if so, under what circumstances or conditions, Court orders or judgments which contravene clear legislation are nullities, void, and attackable at any time, in any manner or forum.

3. Whether judicial encroachment on legislative power is a denial of the due process guarantee of U.S. Constitution's Fourteenth Amendment.

4. Whether an adjudication of contempt procured by fraud or other improprieties, where the alleged contemnor is deprived of property thereby, constitutes a denial of due process.

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Petitioner herein respectfully prays that a writ of certiorari issue to review:

a) the decision of the Court of Appeal of California, dated July 21, 1998

and / or

b) the judgment of the Supreme Court of California, dated October 14, 1998.

I.

OPINIONS BELOW

The opinions of:

(1) The California Court of Appeal

and

(2) The California Supreme Court

are printed in the Appendix (separate accompanying Volume, filed herewith), index on page I, supra.

II.

BASIS FOR JURISDICTION

The order of the Cal. Court of Appeal Court which petitioner seeks to have reviewed was made on July 21, 1998. This Court has jurisdiction to review that order pursuant to 28 U.S.C. Section 1257.

"Sec. 1257. **State courts; certiorari**

(a) Final judgments or decrees rendered by the

highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States."

III

CONSTITUTIONAL, STATUTES, REGULATORY PROVISIONS, RULES INVOLVED

United States Constitution, Amendment Five:

"No person shall . . .be deprived of life, liberty or property without due process of law."

United States Constitution, Amendment Fourteen, Section 1:

". . . [N]or shall any state deprive any

person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law."

United States Constitution (IMPLICIT)

"Separation of Powers." (Leading case: *Springer v. Philippine Islands*, 277 U.S. 189.

California Constitution, Article III, Section 3:

"The powers of state government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the others."

Code of Civil Procedure, Section 695.030 (a):

Sec. 695.030. Non-assignable and non-transferable property; interest in trust; cause of action for money or property.

(a) Except as otherwise provided by statute, property of the judgment debtor that is not assignable or transferable is not subject to enforcement of a money judgment.

Code of Civil Procedure, Section 695.040:

Sec. 695.040. Exempt property; release

Property that is not subject to enforcement of a money judgment may not be levied upon or in any other manner applied to the satisfaction of a money judgment. If property that is not subject to enforcement of a money judgment has been levied upon, the property may be released pursuant to the claim of exemption procedure provided in Article 2 (commencing with Section 703.510) of Chapter 4.

Code of Civil Procedure, Section 703.010 (a):

Sec. 703.010. Application of exemptions

Except as otherwise provided by statute:

(a) the exemption provided by this chapter or by any other statute apply to all procedures for enforcement of a money judgment.

Code of Civil Procedure, Section 703.020 (b) (1)

Sec. 703.020 Persons who may claim exemptions

(b) the exemptions provided in this chapter may be claimed by any of the following persons:

(1) In all cases, by the judgment debtor or a person acting on behalf of the judgment debtor.

Code of Civil Procedure, Section 703.030 (a) (b):

Sec. 703.030. Claiming exemptions; time and manner; waiver; relief for failure to claim

(a) An exemption for property that is described in this chapter or in any other statute as exempt may be claimed within the time and in the manner prescribed in the applicable enforcement procedure. If the exemption is not so claimed, the exemption is waived and the property is subject to enforcement of a money judgment.

(b) Except as otherwise specifically provided by statute, property that is described in this chapter or in any other statute as exempt without making a claim is not subject to any procedure for enforcement of a money judgment.

Code of Civil Procedure, Section 704.100 (a):

Sect. 704.100. Life insurance policies

(a) Unmatured life insurance policies (including endowment and annuity policies), but not the loan value of such policies, are exempt without making a claim. (Emphasis added).

Code of Civil Procedure, Section 704.210:

Sec. 704.210. Property not subject to enforcement of money judgment; exemption

Property that is not subject to enforcement of a money judgment is exempt without making a claim.

Code of Civil Procedure, Section 703.510:

Sec. 703.510. Claiming exemptions after levy; property exempt without claim; release

(a) Except as otherwise provided by statute, property that has been levied upon may be claimed to be exempt as provided in this article.

(b) If property that is exempt without making a claim is levied upon, it may be released

pursuant to the exemption procedure provided in this article. (*Added by Stats. 1982, c. 1364, p. 5151, Sec. 2, operative July 1, 1983).*

California Rules of Court, Rule 24 (a):

"**(a) [When decisions become final]** All decisions of the reviewing courts shall be filed with the clerk, who shall forthwith transmit a copy of the opinion to the lower court or tribunal and to the parties.

A decision of the Supreme Court becomes final 30 days after filing unless the court orders a shorter time or, prior to the expiration of the 30-day periods not to exceed a total of 60 additional days. An order of the Supreme Court denying a petition for review of a decision of a Court of Appeal becomes final when it is filed." [Emphasis added].

IV.

STATEMENT OF THE CASE

Respondents, (ROBERT NOLAN CONRAD, and ROBERT NOLAN CONRAD, A LAW CORPORATION), in executing their judgment against Petitioner, levied

(inter alia) on payments due Petitioner under annuity policy (contract) issued by Travelers Life Insurance Company, Policy #0600SA55449.

The Petitioner filed and served a CLAIM OF EXEMPTION based upon statutes providing that the particular property (right to receive the pertinent annuity payments) is not subject to the enforcement of a money judgment, is exempt without making any claim, and for automatic, incontestable, release thereof from any taking. In essence, Petitioner (in CLAIM and in REPLY) contended that the many statutes, i.e., *Code of Civil Procedure* Sections 695.030 (a); 695.040; 703.010 (a); 703.020 (b) (1); 703.030 (a) (b); 704.100 (a) and 704.210, in sum express compleat intent of the legislature that the subject annuity policy, or payment thereunder, is not subject to the enforcement of a money judgment, and is exempt, without making a claim, (and automatically and incontestably release) from any taking. That indisputable group of statutes, coupled with the doctrine of SEPARATION OF POWERS, clearly expresses the determinative conclusion that no court, trial or review, had any jurisdiction whatsoever to "take" the annuitant's (Petitioner's) payments under the annuity policy. Reference to the "SEPARATION OF POWERS"

doctrine including the provisions of the *California Constitution* and the *United States Constitution*, Implicit, were urged by Petitioner.

Although the phrase "due process" was not actually employed by Petitioner, the contentions of Petitioner (in trial and review courts) are tantamount to and descriptive of the constitutional prohibition against deprivation without "due process."

Respondents' OPPOSITION to Petitioner's CLAIM OF EXEMPTION contended:

1. that Petitioner was not entitled to seek the aid of the Court of Appeal, and not entitled to the property (payments due under the annuity policy). Respondents, in this respect, said that Petitioner was "in contempt" and the "contempt was not purged."

   But the alleged "contempt" was simply non-existent and consequently could not be purged by Petitioner. (Both the Respondents' OPPOSITION, and Petitioner's REPLY thereto, are matters of record and not subject to dispute.)

2. that Respondents were seeking to levy <u>not</u> on the annuity policy, *per se*, but rather on the "proceeds" of the policy.

But the policy itself specifies the obligation (of the annuity-issuing company) to make "payments." The terms "proceeds" and "payments" are synonymous, in all dictionary authority.

The Court of Appeal makes two statements which "decide the case." The decision, (see APPENDIX, p. 2-c-) states:

a) that the policy provides that the "proceeds are assignable" by annuitant. ***But the policy itself expressly provides exactly to the contrary, i.e., "The annuitant does not have any right to sell or assign <u>any annuity payments</u> . . . ."***

b) The second statement is that the "respondent has not sought to levy on the annuity policy, only its proceeds. As is stated above, "proceeds" are exactly synonymous, in such instances, with "payments,"

The Court of Appeal decision also states: "As to maturity, the answer is the same, citing <u>*In re Moffat*</u>

(Bankr. C.D. Cal. 1989) 107 B.R. 255, 261; *In re Moffat* (9th Cir. 1992) 959 F.2d 740.)

As will be more fully delineated in the "REASONS FOR GRANTING THE WRIT," the *Moffat* opinions are literally by their own express terms, not applicable to Petitioner's current annuity.

The Court of Appeal's opinion is a most noteworthy proof of the evils of deviating from and ignoring the controlling "SEPARATION OF POWERS," state and federal. The inescapable dictate of that "SEPARATION" doctrine is that no court (trial or review) has any jurisdiction to reverse or modify the constitutional mandate.

3. that the annuity-issuing company's obligation was "matured." Significance: *California Code of Civil Procedure* Section 704.100 provides that "unmatured" policies "are exempt without making a claim." That position of Respondents was advanced so as to avoid the applicability of that statute, and thus deprive Petitioner of the right to receive the annuity payments "without making a claim." **But if Petitioner was entitled to recover all payments "without making a**

claim," the entire "case" would (and should) be resolved in favor of Petitioner.

Respondents' contention (that the obligation is "matured") is in direct violation of the long-established principle (not disputed) that "matured obligation" means "unconditional obligation." *Black's Law Dictionary,* 6th Ed., p. 979, ergo "unmatured" means "conditional."

Of record, the "obligation" of the "issuing company" is totally conditional upon Petitioner's being "alive" on the date of each payment.

The California Court of Appeals affirmed (Order dated July 21, 1998) the trial Court's denial of exemption.

Petitioner filed PETITION FOR REVIEW in the Supreme Court of California dated August 31,1998.

The California Supreme Court summarily denied Petitioner's PETITION FOR REVIEW, denial dated October 14, 1998.

V.

REASONS FOR GRANTING THE WRIT

Courts are without power to legislate by judicial decision. Meyer v. Board of Public Works (1942) 51 CA 2d 456.

No matter how unfortunate the result may seem through a Court's refusal to qualify the broad terms of a general statute, the Court must not assume the task of legislation. U.S. v. Security-First (D.C. 1940) 30 FSP 115.

Griffin v. Colisa County (1941) 44 Cal. App. 2d 915; Franchise Motors v. Seavey (1925) 196 CA 17; Martin v. Superior Court (1924) 194 C 93.

It is not consistent with our scheme of government for a Court to inquire into the motive of legislators in enacting legislation. Tenney v. Brandhove (1951) 341 U.S. 367, 342, U.S. 843; Allen v. Markham (1947) 156 F 2d 653, 331 U.S. 503; Serve Yourself v. Brock (1952) 39 C 2d 813, 345 U.S. 980; Plum v. State Board (1942) 51 CA 2d 382; Warner v. S. California (1950) 35 C 2d 121.

Obviously, the judgment or order though final on the merits has no binding force or effect and is subject to collateral attack since totally VOID for lack of jurisdiction. 7 Witkin Procedure 3d, Judgment, Section

194; and *Restatement of The Law*, 2d Section 12, 17.

A VOID order may be attacked at any time or anywhere, directly or collaterally whenever it presents itself, either by parties or strangers. It is simply a nullity and can be neither a basis nor evidence of any right whatever. Texas Co. v. Bank of America (1935) 5 Cal. 2d 35, 41. In re Marriage of Lackey (1983) Cal. App. 3d 698, 701.

The California Constitution expressly states the doctrine, sometimes known as "SEPARATION OF POWERS." Parker v. Riley, 18 Cal. 2d, 83, 89; Bixby v. Piero, 4 Cal. 3d 130, 141. The Federal Constitution does not expressly state the doctrine, but the principle has been declared to be implicit in it. Springer v. Philippine Islands 277 U.S. 189 48 S.Ct. 480, 482. It is the province of the judiciary to declare the law as it is, and not as the Court deems it. Kelley v. Aarons 238 F 996, affirmed 245 U.S. 116. The express terms of a statute may not be changed by construction. First Congregational Church of Glendale v. Los Angeles County 9 Cal. 2d 591. Where, as here, the intention of the legislature was without doubt, the Court could not make it otherwise by supposing any condition not

expressed in the act under consideration. Field v. Seavey 60 U.S. 323. Ex parte Slayback 209 Cal. 480, followed in ex parte Merwin 209 Cal. 786.

Petitioner vociferously urged in the trial and review courts below the absolute necessity for observing and applying the federal (as well as state) "SEPARATION OF POWERS" and the "due process" guarantee, (although not in *haec verba*). Those two fundamental principles must not be ignored or avoided in the name of the democratic form of government.

The implications are dangerous and fundamental. The doctrine of "SEPARATION OF POWERS" clearly prevents any valid court action contravening the legislative enactments, but in this case the doctrine is ignored. Respondents do not in their Respondents' Brief dated February 12, 1998, mention, resist or deny the clear assertions of the doctrine in Petitioner's APPELLANT'S OPENING BRIEF in the California Court of Appeals dated December 21, 1997.

The California courts refused to apply and honor the "SEPARATION OF POWERS" doctrine; in fact, they ignored the doctrine despite Petitioner's demand and

request that the doctrine be applied. It is therefore obviously necessary that this Honorable Court honor and apply the federal constitutional mandate known as the "SEPARATION OF POWERS."

This Honorable Court's recognition and enforcement of that doctrine constitutes the last bulwark and bastion defending the rule.

The profoundly serious conclusion of the entire matter in its present state (without corrective intervention by this Court) is the promotion of lawlessness and defiance of fundamental guarantees under the State and Federal Constitutions.

Without the corrective aid of this Court (by the issuance of the Writ) the parties who have fraudulently and perjuriously procured the very Court actions here in question are literally rewarded by the same system and principles of justice they misuse and defy.

By way of example, Respondents actually by fraud and deceit (perjuriously) procured trial Court order finding and holding Petitioner in contempt of AN ORDER

THAT NEVER EXISTED. To compound the outrage, Respondents succeeded in objecting (without any applicable authority) that because the contempt was not purged, Petitioner was not entitled to statutory exemptions.

By straying from the safe pathway of the "SEPARATION OF POWERS," the Court of Appeal decided that Respondents' levy on the "proceeds" (and not on the policy itself), and held that the exemption should be denied. But the distinction on which the Court of Appeal decided that levying on the "proceeds" was permissible (even though the policy expressly and repeatedly provided the exact opposite) is non-existing. In five places the policy actually referred in all pertinent respects to annuity "payments," the synonym for "proceeds." The policy-issuing company made its intentions extra clear by making the reference to "payment(s)" in five distinct places in the policy.

Had the Court of Appeal refrained from encroaching on the legislative branch, the extremely erroneous and totally unsupported conclusion (contented by respondents) would have been avoided.

The California Court of Appeal based its decision and opinion affirming the Superior Court's order denying the exemption, in part by reliance on and citing *"In re Moffat"* (1989 and 1992) decisions. (See APPENDIX, [1989, Pp. 3-20]; [1990, Pp. 20-28]; [1992, Pp. 28-30]). That Court's reliance on *Moffat* is another very serious illustration of the evils and injustices that result from the failure to apply the "SEPARATION OF POWERS" doctrine. The three *Moffat* opinions expressly and explicitly stated that the *Moffat* conclusions applied to no other annuities, (certainly not Petitioner's), by carefully noting that it was speaking only of the "subject annuity" or the "annuity in question." [Emphasis added].

In endorsing and adopting the *Moffat* opinions, the Court of Appeal was figuratively sailing the judicial ship in hazardous waters. The dangers consisted of the contentions that:

a) Petitioner's annuity is "matured."

Wrong: Petitioner's policy was "not matured" because indisputably "conditional" on his being alive. *Black's Law Dictionary*, 6th Ed. , P. 979.

b) The *Moffat* court noted the two distinct interests in an annuity, i.e., the "ownership interest" and the "beneficiary interest."

The statement deceives by omission, the Moffat court opinion states that the reason for the distinction is entirely prescribed by the Bankruptcy Code and not by California law, since "California opted to use its own statutory exemptions instead of the Federal ones." (1989) *Moffat* 107 B.R. 255, 253, and 263 Fn 14.

c) The cost of the *Moffat* annuity was $190,000 but the *Moffat* folks (Dr. & wife) will receive exactly $174,000, i.e., a loss certain to occur.

It is an undisputed fact, of record, that although the Rosenthal annuity cost was $299,719, the annuity payments paid to 1988 have totaled in excess of $800,000. [Payments at $50,000 per yr., since October 1981].

d) Dr. Moffat testified that he and Mrs. Moffat bought the annuity to keep his creditors from

reaching assets. *In re Moffat* 107 B.R. 257.

It is another undisputed fact, of record, that at the time of issuance of the Petitioner Rosenthal annuity (1981), Petitioner had no creditors.

The above illustrates observations re the serious errors of the Court of Appeal's reliance on and citing *Moffat* and further illustrates the folly and injustice of failing to support and apply the constitutional mandate of "SEPARATION OF POWERS," and the violation of "due process" rights.

Additionally serious distortions or injustices arising from the failure to apply "SEPARATION OF POWERS" and "due process," constitutes the failure to enforce the clear legislative intent and enactments that the annuity payments are not subject to the enforcement of a money judgment, are exempt without making a claim, and are automatically and indisputably to be released from any "taking."

It is difficult to conceive another situation in which the legislative intent and purpose is so clearly and

forcefully expressed. Indeed, in the many statutes, Code of Civil Procedure, Sections, i.e., 695.030 (a), 695.040, 703.010 (a), 703.020 (b) (1), 703.030 (a) (b), 703.510, 704.100 (a), and 704.210 which are set forth above in **Part III, CONSTITUTIONAL, STATUTES ...INVOLVED."**

VI.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Petition for a writ of certiorari should be granted.

Respectfully submitted,

Dated: MARCH 14, 1999.



JEROME B. ROSENTHAL
PETITIONER, PRO SE

EDITOR'S NOTE

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Respondents [Plaintiffs]

On Petition For A Writ of Certiorari
To The Court of Appeal of California
Second Appellate District

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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Petitioner, PRO SE

102 pp

Second Appellate District, Division Seven, No. B096046
S073011

IN THE SUPREME COURT OF CALIFORNIA

ROBERT NOLAN CONRAD, Respondent

v.

JEROME B. ROSENTHAL, Appellant

SUPREME COURT
FILED
OCT. 14 1998
Robert Wandruff Clerk

Deputy

Appellant's petition for review DENIED.
The request for an order directing publication of the opinion is denied.

Mosk, J., did not participate.

GEORGE

Chief Justice

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION 7

ROBERT NOLAN CONRAD, B096046

Plaintiff and Respondent, (Super. Ct.No. C545108)

v.

JEROME B. ROSENTHAL,

Defendant and Appellant.

COURT OF APPEAL - SECOND DIST
F I L E D
JUL 21 1998
JOSEPH A. LANE Clerk
. . . . . .
Deputy Clerk

APPEAL from an order of the Superior Court of Los Angeles County. Ronald M. Sohigian, Judge. Affirmed.

Jerome B. Rosenthal, in pro. Per., for Defendant and Appellant.

Freeman, Freeman and Smiley, Michael Blumenfeld and Leslie E. Wallis for Plaintiff and Respondent.

Appellant is a judgment debtor who claimed his $12,500 quarterly annuity payments were exempt from levy. This appeal is form an order denying the exemption. We affirm.

BACKGROUND

In 1985, Robert Nolan Conrad, respondent, filed an action against appellant, *Conrad v. Rosenthal,* C545108. The action sought a declaratory judgment as to the ownership of a $2.2 million legal fee which had been paid into a bank trust account by the client pending the outcome of the lawsuit. The action also sought actual and punitive damages against Rosenthal for Rosenthal's interference with Conrad's right to collect the fee from the clients.

After a jury trial in February 1990, the jury determined that Conrad was the owner of the fee and also awarded Conrad $112,360 in compensatory damages and $150,000 in punitive damages. Judgment was entered on March 19, 1990. At the conclusion of Rosenthal's unsuccessful appeal, the $2.2 million was paid to Conrad. Conrad then set about collecting the $262,000 damage award. As a result of this judgment, a writ of execution was issued for a money judgment in favor of Conrad in the amount of $278,415.94.

In an attempt to satisfy the judgment, Conrad attempted to conduct a judgment debtor examination. In May 1991, and following extensive briefing and argument, Superior Court Judge Stephen O'Neil held Rosenthal in contempt for willfully disobeying a court order to answer questions during that judgment debtor examination. As a result of the contempt order, Rosenthal remained in jail between April 1991 and November 1993. Rosenthal's attempts to overturn the contempt citation were unsuccessful. Thereafter, although the contempt order remained in effect, Rosenthal was released from custody.

Respondent discovered appellant had an annuity with Traveler's Insurance from which he received $12,500 every three months. Respondent levied upon the annuity. Appellant claimed the annuity was exempt from levy. The trial court denied the exemption. This appeal followed.

DISCUSSION

Appellant contends his annuity is exempt from levy for two reasons:

(1) it "is not assignable or transferable" (Code Civ. Proc., Proc., Sec. 695.030[1]) and

(2) it is an "unmatured" policy (Code Civ. Proc., Sec. 704.100[2]

1

The section reads:

"(a) Except as otherwise provided by statute, property of the judgment debtor that is not assignable or transferable is not subject to enforcement of a money judgment.

"(b) the following property is subject to enforcement of a money judgment:

"(1) An interest in a trust, to the extent provided by law.

"(2) A cause of action for money or property that is the subject of a pending action or special proceeding."

2

The section reads:

"(a) Unmatured life insurance policies (including endowment and annuity policies), but not the loan value of such policies, are exempt without making a claim.

"(b) The aggregate loan value of unmatured life insurance policies (including endowment and annuity policies) is subject to the enforcement of a money judgment but is exempt in the amount of eight thousand dollars ($8,000). If the judgment debtor is married, each spouse is entitled to a separate exemption under this subdivision, and the exemptions of the spouses may be combined, regardless of whether the policies belong to either or both spouses and regardless of whether the spouse of the judgment debtor is also a judgment debtor under the judgment. The exemption provided by this subdivision shall be first applied to policies other than the policy before the court and then, if the exemption is not exhausted, to the policy before the court.

"(c) Benefits from matured life insurance policies (including endowment and annuity policies) are exempt to the extent reasonably necessary for the support of the judgment debtor and the spouse and dependents of the judgment debtor."

As to assignability, respondent has not sought to levy on the annuity policy, only its proceeds. Manifestly, those $12,500 proceeds are assignable.

As to maturity, the answer is the same. (*In re Moffat* (Bankr. C.D. Cal. 1989) 107 B.R. 255, 261; *In re Moffat* (9th Cir. 1992) 959 F.2d 740.)

Having so concluded, we need not address repondent's other reasons why it should prevail and why appellant's appeal should be dismissed. (See *Stone v. Bach* (1978) 80 Cal. App. 3d 442.)

DISPOSITION

The order is affirmed. Costs on appeal are awarded to rrespondent.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

WOODS, J.

We concur.

LILLIE, J.

NEAL, J.

In re Gordon H. MOFFAT, Debtor.
Bankruptcy No. LA 88-2019-KM.
United States Bankruptcy Court,
C.D. California.
Oct. 31, 1989
(IN RE MOFFAT Cite as 107 B.R. 255 (Bkrtcy, C.D.Cal. 1989)

Trustee objected to exemptions claimed by Chapter 7 debtor in principal residence and in annuity purchased in preparation for bankruptcy filing. The Bankruptcy Court, Kathleen P. March, J., held that: (1) under California law, debtor was entitled to automatic homestead exemption in property which he no longer owned, but in which he continued to reside, rent-free, as settlor and beneficiary of trust, but (2) quarterly payments which debtor received from matured, single-premium annuity were not "reasonably necessary" to support debtor and spouse, within the meaning of California exemption.

Objection sustained in part and overruled in part.

1. Homestead 88

Under California law, debtor was entitled to automatic homestead exemption in property which he no longer owned, but in which he continued to reside, as settlor and beneficiary of revocable trust. West's Ann.Cal.C.c.P. Sec. 704.720.

2. Homestead 62

Under California law, debtor was entitled only to basic $30,000 homestead exemption in property which he had conveyed to revocable trust for benefit of himself and his wife; debtor's wife, who was only other person to reside on property, had noncommunity property interest therein as beneficiary of trust, such as would prevent debtor from claiming special $45,000 homestead exemption. West's Ann.Cal.C.C.P. Sections 704.720, 704.730 (a)(1,2).

3. Homestead 49

Chapter 7 debtor's interest in single premium deferred annuity which he purchased prepetition was "matured" within meaning of California exemption, when debtor filed for bankruptcy, notwithstanding that first payment was made postpetition; debtor's right to payments arose on date that maturity was purchased. West's Ann.Cal.C.C.P. Sec. 704.100.

See publication Words and Phrases for other judicial constructions and definitions.

4. Exemptions 49

Quarterly payments that orthodontist would be receiving from annuity were not "reasonably necessary" to support orthodontist and wife, within meaning of California exemption, where orthodontist had gross monthly income of over $5,000 from

practice, received another $800 per month in social security payments, and could reasonably be expected to sell his practice in order to finance his retirement. West's Ann.Cal.C.C.P. Sec. 704.100 (c).

See publication Words and Phrases for other judicial constructions and definitions.

5. Exemptions 49

Debtor cannot make proceeds of annuity policy "reasonably necessary" for his support, within meaning of state law exemption, merely by increasing his debts in preparation for bankruptcy filing. West's Ann.Cal.C.C.P. Sec. 704.100(c).

6. Exemptions 49

California exemption for unmatured annuities extends only to "ownership" interests in such annuities, and not to beneficial interests. West's Ann.Cal. C.C.P. Sec. 704.100(a)

Richard M. Moneymaker, Moneymaker & Kelley, Los Angeles, Cal. For debtor.

David R. Haberbush, Roquemore, Pringle & Moore, Los Angeles, Cal., Chapter 7 trustee.

OPINION

KATHLEEN P. MARCH, Bankruptcy Judge.

I.

FACTS

In this contested matter, the Chapter 7 Trustee, David Haberbush, filed a motion pursuant to Bankruptcy Rule 4003(b), objecting to debtor's claimed exemptions under 11 U.S.C. Sec. 522(b)(1). Debtor filed opposition responding to the Trustee's objections both on legal and factual grounds. Pursuant to rules 121(2) and 111(1)(k) of the Local Rules of the United States Bankruptcy Court for the Central District of California, the Court ordered the parties to prepare a pre-trial order and scheduled this matter for an evidentiary hearing. After the evidentiary hearing, the parties were ordered to submit closing briefs.

The Debtor Gordon H. Moffat, an orthodontist, filed his Chapter 7 petition on September 22, 1989. Along with his petition, debtor filed a list of property claimed exempt under 11 U.S.C. Sec. 522(b)(1), as required by Bankruptcy Rule 4003(a). Among the property claimed exempt by debtor were (1) a $45,000.00 homestead in his personal residence located at 4927 El Sereno Street, La Crescenta, California, and (2) an unspecified interest in a $190,000.00 single premium deferred annuity.[1]

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[1] There are two types of property interests in an annuity. There is the ownership interest, and there is the interest in the benefit payments to be received from the

Debtor claimed these exemptions pursuant to California Code of Civil Procedure Sections 704.720 and 704.100 respectively.[2]

In preparation for filing his present petition,[3] debtor engaged in various pre-bankruptcy transactions. On February 5, 1988, debtor along with his spouse, created "The Gordon H. Moffat and Barbara B. Moffat Living Trust" (herein after referred to as the "Living Trust"), naming themselves along with their children as trust beneficiaries.[4] On the same day, debtor transferred title to his personal residence to the Living Trust. On February 28, 1988, debtor borrowed $300,000.00 against his home, utilizing $190,000.00 of the proceeds to purchase a single premium preferred

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annuity called the beneficial interest. California Code of Civil Procedure Sec. 704.100 (West 1987) exempts the ownership interest in certain kinds of annuities. Debtor's B-4 schedule fails to specify which interest debtor is claiming as exempt. Given debtor's failure to distinguish between the ownership interest and the beneficiary interest in the annuity, this court must construe debtor's schedule as claiming an exemption in both the ownership and beneficiary interest in the subject annuity.

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There are Pursuant to the B-1 schedules filed herein, debtor also claims an exemption in various life insurance policies with "Executive Life and UPI" under California Code of Civil Procedure Sec. 704.710 (West 1987). The trustee's initial moving papers raised an objection to debtor's claim that these policies were exempt. The trustee, however, abandoned this objection by failing to include it in the pre-trial order submitted by the parties and ultimately approved by the court. To the extent the pretrial order supersedes the trustee's initial moving papers as a summation of the trustee's objections to debtor claim of exemption, there is no pending issue before the court regarding the propriety of debtor's claim to an exemption in the subject life insurance policies.

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This is debtor's second bankruptcy filing. Debtor filed his first petition approximately ten years ago with the assistance of present bankruptcy counsel, the firm of Moneymaker & Kelly. Debtor testified that he filed his present petition primarily for the purpose of discharging a debt arising from a $300,000.00 malpractice judgment entered against him.

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Specifically, debtor holds a 12% interest, debtor's wife holds a 48% interest, and debtor's four children hold a 205 interest as beneficiaries of the living trust.

Trust. Debtor testified at the evidentiary hearing that he and his spouse created the Living Trust[5] and purchased the $190,000.00 annuity on the advice of counsel in order to keep his creditors from reaching these assets by maximizing allowable exemptions.

The Trustee objects to debtor's claiming a homestead exemption on the ground that pursuant to U.S.C. Sec. 522(b) debtor cannot claim an exemption in an asset which is not property of the estate. The trust document admitted into evidence confirms the trustee's allegation that title to the residence is held by the Living Trust. The trust document, however, reveals that debtor and his spouse, and consequently the bankruptcy estate, hold various legal interests in the trust affecting title to the subject residence, including (1) the right as trustor(s) to revoke the trust in whole or in part and (2) the right as beneficiaries under the trust to live on the property during their lifetime without obligation to pay rent.

The Trustee also objects to debtor's claimed exemption in the ownership interest of the $190,000.00 single premium deferred annuity on the ground that, pursuant to California Code of Civil Procedure Sec. 704.100(a), debtor is not entitled to claim as exempt his ownership interest in a "matured" annuity. In addition, the trustee objects to debtor's claimed exemption in the beneficiary interest of the $190,000.00 annuity policy on the ground that pursuant to California Code of Civil Procedure Sec. 704.100© debtor is not entitled to claim an exemption in annuity benefits which are not "reasonably necessary for the support of the judgment debtor and spouse and dependents of the judgment debtor."

The annuity policy admitted into evidence reveals that debtor purchased the subject annuity for a single premium of $190,000.00, naming himself both as owner and annuitant under the policy. Debtor named his spouse as the contingent beneficiary.

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Throughout his testimony at the evidentiary hearing, debtor referred to the trust created on February 5, 1988, in anticipation of filing his present bankruptcy petition as the "family trust." The trust document admitted into evidence, however, is captioned "the Gordon H. Moffat and Barbara B. Moffat *Living Trust*" (emphasis added). The living trust consists of three trusts one of which is entitled a "family trust." However, it does not appear from the trust document that the home in question was transferred into the family trust; rather the property was transferred into the Living Trust. Article I of the trust document provides that "This Trust and all trusts derived herefrom shall be known as the GORDON H. MOFFAT AND BARBARA B MOFFAT LIVING TRUST." Accordingly, this court will refer to the trust in question as the "living trust" rather than the "family trust."

rsuant to the terms of the policy, debtor as the annuitant, will receive forty quarterly ayments-certain" of $4,370.00 which commenced on October 1, 1988 (i.e., nine ys after debtor filed for bankruptcy). The annuity provides that if the annuitant dies fore receiving the forty "payments-certain," the contingent beneficiary, Mrs. Moffat, ll receive the remaining payments.

Debtor is a practicing orthodontist. Not including any income from the annuity, btor and his spouse receive a combined monthly gross income of $5,600.00 rned by debtor, and $600.00 earned by debtor's wife, plus Social Security benefits. om these gross amounts debtor's take home pay is $4,464.00 and his wife's take me pay is $432.00. (Debtor's testimony, plus Schedule of Debtor's Current Income d Current Expenditures to his Bankruptcy Petition, received in evidence at the aring.) Debtor testified that $5,000.00 of his monthly $5,600 gross income is salary om his orthodontics practice, paid through his wholly owned and operated rporation, Dr. Gordon H. Moffat, a Professional Corporation. Debtor testified his holly owned corporation grosses approximately $400,000 a year. Debtor sees 200 - 00 patients a month in his practice. In addition to the income from his wholly wned corporation, debtor testified that he receives $1,000 to $1,500 a month as onsulting fees for consulting for an insurance company, the American Guild of rthodontics. In addition to the earnings from his practice and consulting, debtor stified that he also receives $800 a month of Social Security payments. No vidence was submitted that debtor is unable to continue carrying on his practice for he foreseeable future. Moreover, debtor received an offer to purchase one part of his ractice for $50,000.

Before mortgaging his home to purchase the subject annuity, debtor had a monthly nortgage payment of only $1,600. After borrowing against the house to purchase the 190,000 annuity, debtor's monthly mortgage payment is $2,600. Debtor maintains he needs $4,370 quarterly annuity payment in order to service the debt on his home.

Lastly, in his closing brief, the trustee for the first time raises the argument that debtor's claim of exemption should be disallowed on the ground that debtor's purchase of the annuity constitutes a fraudulent conveyance under California law.

II.

ISSUES PRESENTED

This contested proceeding presents the following issues:

A. Whether debtor is entitled to claim a $45,000 homestead exemption in his principal residence, pursuant to California Code of Civil Procedure Section 704.720, when title to the dwelling is held in a living trust of which both debtor and his spouse are trustors and beneficiaries;

B. Whether debtor is entitled to claim an exemption in either the ownership or beneficiary interest in a $190,000 single premium deferred annuity, pursuant to

California Code of Civil Procedure Sec.704.100, regardless of whether the annuit found to be "matured" or "unmatured;" and,

C. Whether debtor's claim of exemption in the $190,000 single premium defe annuity can be disallowed on the ground the purchase of the annuity constitut fraudulent conveyance.

III.

ANALYSIS

The United States Bankruptcy Code permits states to opt out of the fed exemption statutory schemes set forth in 11 U.S.C. Sec. 522(d). Bankruptcy C Sec. 522(b)(1). In enacting California Code of Civil Procedure Sec. 703.1 California opted out of the federal exemption scheme relegating debtor to whate exemptions are provided under state law. Consequently, substantive issues regard the allowance or disallowance of a claimed exemption are governed by state law California. However, the Bankruptcy Rules set forth the procedural framework filing both a list of property claimed as exempt and objections to claimed exempti Bankruptcy Rule 4003(a) and (b). In a proceeding under Bankruptcy Rule 4003 the objecting party has the burden of providing that debtor is not entitled to claimed exemption. Bankruptcy Rule 4003(c).

A. Debtor is Entitled to a $30,000 Homestead Exemption Pursuant to Califo Code of Civil Procedure Sec. 704.720

Debtor claims an "automatic"[6] homestead exemption in his personal reside pursuant to California Code of Civil Procedure Sec. 704.720 in the amoun $45,000. In relation to the automatic homestead exemption, a "homestead defined as the ". . .the principal *dwelling* . . .in which the judgment debtor or judgment debtor's spouse resides . . . ." California Code of Civil Procedure 704.710© (West 1987). (Emphasis added). For the purposes of the autom homestead exemption, California Code of Civil Procedure Sec. 704.710 (a)(1) def a "dwelling" as including "[a] house together with the outbuildings and the land u which they are situated."[7] The amount of a homestead is determined by Califo

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For a discussion of the distinction between the "automatic" and the "declared homestead see *In re Knudsen*, 80 B.R. 193 (Bankr.C.D.Cal. 1987).

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The definition of dwelling under this automatic homestead article, Article 4, different from the definition of dwelling under C.C.P. Sec. 704.910 (West 19 the declared homestead article, California Code of Civil Procedure Sec. 704. (West 1987), gives a more restrictive definition of dwelling as follows: "(c)

Code of Civil Procedure Sec. 704.730 (a)(1) which provides debtors with a $30,000 homestead unless a debtor comes within subsection (a)(2) or (a)(3). Debtor herein alleges he comes within subsection (a)(2) which provides a $45,000 homestead:

"[I]f the judgment debtor or spouse of the judgment debtor who resides in the homestead is at the time of the attempted sale of the homestead member of a family unit and there is at least one member of the family unit who own no interest in the homestead or whose only interest in the homestead is a community property interest with the judgment debtor." California Code of Civil Procedure Section 704.730(a)(2) (West 1989).

Debtor argues he is entitled to the 45,000 homestead exemption on the ground that both he and his spouse utilize the subject dwelling as their principal residence and both he and his spouse hold as an interest in the subject property as trustors, trustees and beneficiaries under the subject trust. Debtor points out that California Code of Civil Procedure Sec. 704.720 does not limit the right to claim a homestead exemption to individuals who have an "ownership" interest in the subject property.[8]

1. The Bankruptcy Estate Holds Various Legal Interests in the Subject Dwelling

[1] The Trustee objects to debtor's claim to a $45,000 homestead on the ground that debtor is not entitled to claim a homestead exemption in a dwelling which is not property of the estate. 11 U.S.C. 522(b) provides that:

[n]otwithstanding section 541 of this title, an individual debtor *may exempt from the property of the estate* the property listed in either paragraph (1) or, in the alternative, paragraph (2) of this subsection." 11 U.S.C. Sec. 522(b) (Emphasis added).

'Dwelling' means any interest in real property . . .but does not include . . .the interest of the beneficiary of a trust." California Code of Civil Procedure Sec. 704.910 (West 1987).

Thus a debtor whose sole interest in a dwelling as a beneficiary of a trust could not claim a declared homestead exemption regarding the dwelling, but could claim an automatic homestead exemption regarding that dwelling, since "dwelling" as defined in the automatic homestead article, California Code of Civil Procedure Sec. 704.710 (West 1987) does not contain the restriction regarding beneficiaries of trusts that the declared homestead exemption, California Code of Civil Procedure Sec. 704.910 (West 1987) contains.

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As noted in footnote 7, *Supra* debtor is correct that the right to claim an "automatic" homestead exemption is *not* limited to individuals who have an ownership interest in the dwelling.

The trustee maintains that because debtor transferred title to the subject residence to the Living Trust before filing his bankruptcy petition, the residence is not property of the estate pursuant to 11 U.S.C. Sec.541(a) from which debtor can claim an exemption.[9] The trustee's contention that debtor cannot claim a homestead exemption in the subject dwelling because legal title to the property is not held by the bankruptcy estate is without merit. While title to the dwelling is in the Living Trust, as the trustee asserts, debtor holds various "legal interests" in the subject dwelling as a trustor and beneficiary of the living trust.[10]

11 U.S.C. 541 (a)(1) provides that, *inter alia*, ". . . a [bankruptcy] estate is comprised of . . . all legal or equitable interests of the debtor . . . ." Debtor's interest as a trustor and beneficiary under the Living Trust, among other things, all became property of the bankruptcy estate pursuant to 11 U.S.C. Sec. 541 (a) upon the filing of debtor's petition. Debtor is entitled to claim an exemption in either of these legal interests.

Pursuant to debtor's interest as trustor in the "revocable" living trust, the bankruptcy estate holds a "contingent reversionary interest" in the subject dwelling. The bankruptcy trustee–standing in debtor's place as trustor of the Living Trust –can, in his discretion, revoke the trust in whole or in part, reverting title in the residence back to the bankruptcy estate.[11] Debtor claims a homestead in this "contingent reversionary interest" and the trustee has failed to produce any legal authority for the proposition that a homestead cannot be claimed in such an interest. The trustee ha

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[9] Debtor argues Trustee's contention is without merit because exempt property, by its very nature, never becomes property of the estate. Debtor's contention, however, is in error "[e]ven exempt property must initially be regarded as property of the estate and then claimed and distributed as exempt." (*Citations omitted*) *In re Poynor* 68 B.R. 919, 921 (Bankr. N.D. Tex 1987).

[10] Note, debtor also holds an "equitable interest" in the subject property as trustee of the Living Trust.

[11] If the trustee revoked the Living Trust (transferring title of the residence from the living trust to the bankruptcy estate), the bankruptcy estate would hold legal title to the dwelling subject to a first deed of trust in the sum of $300,000 and an abstract of judgement in the sum of $300,000. Consequently, if the bankruptcy trustee reverted title in the dwelling back into the bankruptcy estate, there would be no equity from which debtor could claim a homestead exemption unless debtor avoided the judgement lien pursuant to 11 U.S.C. Sec. 522 (f).

failed to meet his burden of proving a homestead exemption claim should be disallowed. Consequently, this court must find that debtor is entitled to claim a homestead exemption in his principal dwelling even if debtor's sole interest in it was a "contingent reversionary interest."

Furthermore, pursuant to debtor's interest as a beneficiary under the Living Trust, debtor and his spouse are entitled to reside in the subject dwelling "without an obligation to pay rent" during their life time, (i.e., debtor holds a "life estate"). Upon the filing of debtor's petition, however, debtor's life estate transferred to the bankruptcy estate (i.e.,the bankruptcy estate holds an "estate pur altra vie").[12] Debtor claims a homestead exemption in this "life estate" and the trustee has failed to produce any legal authority for the proposition that a homestead exemption cannot be claimed in such an interest. The trustee has failed to meet his burden of proving that debtor's claim to a homestead exemption should be disallowed. Consequently, this Court holds that debtor is entitled to claim a homestead exemption in his principal dwelling notwithstanding the fact debtor's sole interest in the dwelling may be a "life estate."

2. Debtor Does Not qualify for a $45,000 Homestead Exemption

[2] However, debtor is not entitled to claim a homestead exemption in the amount of $45,000. Pursuant to California Code of Civil Procedure Sec. 704.730(a)(1) debtor is only entitled to a $30,000 homestead exemption, unless debtor comes with subsection (a)(2), i.e., that is ". . .there is at least one member of the family unit *who owns no interest in the homestead or whose only interest in the homestead is a community property interest . . . .*" (Emphasis added). The evidence presented at the evidentiary hearing, however, reveals that there is no member of a family unit who holds either "no interest" or simply holds a "community property interest" in the dwelling. Debtor and his spouse live in the subject property alone and both debtor and his spouse hold separate interest in the dwelling both in the form of "contingent reversionary interests" and "life estates." Consequently, debtor is only entitled to a homestead exemption in the subject dwelling in n the amount of $30,000. The

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Theoretically, the bankruptcy trustee could sell debtor's life estate in the subject property, and debtor would be entitled to claim a homestead exemption from the proceeds of the sale. As a practical matter, however, debtor's life estate has little if any monetary value. As noted earlier, debtor's residence is held subject to a first deed of trust in the sum of $300,000 and judicial lien in the sum of $300,000.

trustee's objection is overruled regarding debtor's right to claim a homeste exemption in the dwelling, but is partially sustained regarding the amount of t exemption, since the proper amount of the exemption is $30,000, not the $45,0 claimed.

B. Debtor May Not Validly Exempt Either an Ownership or a Beneficiary Interest in the $190,000 Single Premium Deferred Annuity

Debtor claims an exemption in both the ownership and beneficiary interests und the $190,000 annuity policy pursuant to California Code of Civil Procedure Se 704.100. California Code of Civil Procedure Sec. 704.100 provides:

[a] *Unmatured* life insurance policies (including endowment and *annuity policie* but not the loan value of such policies, are exempt without making a clai (Emphasis added).

* * * * *

[c] Benefits from *matured* life insurance policies (including endowment and *annu policies*) are exempt to the extent reasonably necessary for the support of t judgment debtor and the spouse and dependents of the judgment debtor. Californ Code of Civil Procedure Sec. 704.100 (Emphasis added).

Debtor argues that the quarterly payments to be made under the annuity policy he in issue are exempt under California Code of Civil Procedure Sec. 704.100(a) on t theory that the annuity policy is *unmatured*. Debtor argues in the alternative (a inconsistently) that if the quarterly payments to be paid under the annuity are *matur* rather than unmatured, the $4,370 quarterly payments should still be held exem because these $4,370 payments are "reasonably necessary" for the support of t debtor Moffat and his spouse.

1. *The Subject Annuity is "Matured"*

[3] In order to determine whether debtor can claim an exemption in *any interest* the annuity (either the ownership or the beneficiary interest), this Court m determine whether the subject annuity is "matured" or "unmatured." The annuity question is payable in quarterly payments over a ten year period. The payout peri commenced in October of 1988. Neither the parties nor the court were able to loc any dispositive state or federal court authority on point addressing the question whether an annuity whose payment is contingent *solely* on the passage of time "matured" or "unmatured." However, logic dictates holding that the annuity question was mature when purchased, since no further act of any kind was necess on the part of the debtor, or any other person, for debtor to be entitled to the payments.

This is unlike the situation where a life insurance policy is the instrument question. In the case of a life insurance policy, the insured life has to die before t insurance company is obligated to pay. Here the debtor does not have to die, or t

any other act, and there is no insured life. Rather, the annuity company was contractually obligated to pay the 40 payments as soon as the annuity policy was purchased and the $190,000 purchase price paid, with the 40 payments to start on the date chosen by debtor at the time debtor purchased the annuity. The fact that a debtor may choose an annuity contract where the stream of 40 payments starts a week or two *after* , rather than a week or two *before*, he files his bankruptcy petition cannot rationally be deemed to make the policy unmatured as of the date of filing. After all, the *right* to receive the 40 payments arises the day the annuity is purchased, a date which is prepetition. *Black's Law Dictionary* defines "maturity" as "the date at which an obligation . . .becomes due." Black's Law Dictionary 883 (5th ed. 1979). Here, the annuity company's duty to pay arose on the date the annuity policy was purchased. Thus, the obligation was owed, i.e., "became due," on the date the annuity was purchased, despite the fact that the debtor delayed the time the payments would be made to a later date convenient to him. Accordingly, this court holds that the subject single premium deferred annuity was "matured," when purchased, as the term "matured" is used in California Code of Civil Procedure Sec. 704.100.

2. The Benefit Payments Are Not Reasonably Necessary to Support the Debtor and His Spouse

[4] In light of this Court's holding that the subject annuity has "matured," debtor cannot validly claim an exemption in any interest under the annuity under California Code of Civil Procedure Sec.704.100 (a) (governing "unmatured" annuities). However, debtor is entitled to claim an exemption in the annuity to the extend for by California Code of Civil Procedure section 704.100[c] (governing "matured" annuities). Pursuant to subsection [c], debtor is entitled to claim an exemption in the beneficiary interest of a matured annuity to the extent the benefit payments from the annuity are "reasonably necessary" for the support of the judgment debtor and the spouse and dependents of the judgment debtor. (California Code of Civil Procedure Sec. 704.100[c] is quoted *supra*).

Based on the evidence presented, this Court finds that none of the forty quarterly benefit payments are "reasonably necessary" for the support of debtor, his spouse or his dependents. As set forth *supra*, debtor receives a gross monthly income of $5,600 month from his orthodontics practice and consulting. Should he wish at some future date to stop practicing, debtor can reasonably be expected to sell his practice finance his retirement. He testified he had already received an offer to sell a certain part of his practice. No evidence was presented that the debtor is unable to continue working. At the time of trial he was practicing actively. Debtor also testified that he receives social security payments of approximately $800 a month. In addition debtor's earnings, debtor's spouse, who also resides in the residence, receives a gross salary of $600 per month. (Debtor's testimony and Schedule of Current Income

and Current Expenditures to his Bankruptcy Petition, received in evidence).

[5] The fact that debtor's mortgage payments on his residence increased because refinanced his residence to purchase the annuity does not mean that the annu payments are "reasonably necessary" to support the debtor because his mortga payments had gone up. Annuity payments cannot be held to be reasonably necess to support a debtor merely because a debtor immediately before bankrup voluntarily takes on additional debts. A debtor cannot make proceeds of an annu policy "reasonably necessary" for his support, and therefore unavailable to be u to pay his creditors, merely because the debtor goes out and increases his debt preparation for filing bankruptcy. To do so would reward debtors who borrow much as possible immediately before bankruptcy, while penalizing debtors who not do so. The measure of "reasonably necessary" is not how much debt the deb can run up, but the objective standard of how much a debtor reasonably need live.[13] If a debtor has excessively incumbered his residence with consensual liens may lose the residence, or he may use the 47,900 gross monthly income he and wife have from their work and other sources to continue paying the higher mon mortgage.

3. If the Subject Annuity is Deemed "Unmatured", Debtor is Still Not Entitled to Claim an Exemption in the Beneficiary Interest

[6] Given the lack of dispositive state or federal court authority on the questio whether an annuity has "matured," this court will now, in the alternative, address question of what exemption, if any, debtor would be entitled to claim if the po were *assumed, arguendo* (and contrary to this Court's holding), to be "unmatur If the annuity is assumed, *arguendo* to be "unmatured," debtor cannot clain exemption in any interest under the annuity under California Code of Civil Proce Section 704.100 [c] (governing "matured" annuities). However, debtor woul entitled to claim an exemption in any interest in the policy provided for by Califo Code of Civil Procedure Sec. 704.100 [a] (governing "unmatured" annui Subsection (a) quoted *supra* states: "[u]nmatured . . .annuity policies . . .are exen

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Though there does not appear to be a case directly on point, see by analogy California Code of Civil Procedure Sec. 704.200 (b) (West 1989), which def when an item of personal property is "ordinary and reasonably necessary" fo the debtor as being the objective standard of: "(1) The extent to which the particular type of item is customarily found in a household. (2) Whether the particular item has extraordinary value as compared to the value of items of same type found in other households." See *In re Lucas*, 77 B.R. 242 (9th Ci B.A.P. 1987).

alifornia code of Civil Procedure sec. 704.100 [a] (West 1987). There is a question, owever, as to whether this language or subsection exempts the "ownership interest" an annuity, or the "beneficiary interest" of an annuity, or both the ownership and e beneficiary interest.

The Court and the parties found no state court cases, and only one federal case, onstruing California Code of Civil Procedure Sec. 704.100 [a].[14] That case is the inth Circuit case of Woodson v. Fireman's Fund Insurance Company, (In re Woodson), 839 F.2d 610 (9th Cir.1988), where the Ninth Circuit stated:

> "Both federal and California law fully exempt the ownership interest in the unmatured life insurance policy and exempt the loan value of the policy up to $4000. See 11 U.S.C. Sec. 522(D)(7)-(8); Cal. Civ. Proc. Code Sections 703.140(b)(7)(8); 704.100(a)-(b). Both only partially exempt the proceeds of matured life insurance policies based on the needs of the debtor. See 11 U.S.C. Sec. 522 (d) (11) © (1892) (proceeds of life insurance contract insuring life of individual of whom debtor was a dependent at insured's death are exempt to the extent reasonably necessary for the support of the debtor and any dependents of the debtor.) Cal.Civ.Proc. Code Sec. 704.100(c)."

Woodson, 839 F.2d at 618, Footnote 12 (emphasis added).

The Ninth Circuit in Woodson recognized the difference between the ownership interest and the beneficiary interest in a life insurance policy, concluding hat "[w]e must treat the two interests disparately because the Bankruptcy Code does so." 839 F.2d at 618; *see In re Poynor*, 68 B.R. 919, 923 (Bankr. N.D.Tex.1987) "[t]his distinction between the ownership rights and beneficiary right appears to be more consistent with the intent of the Bankruptcy Code.")

Debtor argues that under the *Woodson* case, the payments to be received pursuant o an unmatured life insurance policy are completely exempt. However, *Woodson*, as just quoted, does not say this. *Woodson* says only that the *ownership* interest in the unmatured life insurance annuity policy, and the loan value up to $4000 are exempt. It does not say that the *payments* which will eventually be received from an insurance or an annuity policy are exempt.

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[14] Though as noted in *Woodson v. Fireman's Fund Insurance Company*, 839 F.2d 610 (9th Cir. 1988), there are cases construing 11 U.S.C. Sec. 522 (d) (7) and (8), the federal exemption statute governing life insurance contracts (not annuity contracts). However, as noted *supra* as allowed by 11 U.S.C. Sec. 522 9b) (1), California opted to use its own statutory exemptions instead of the federal exemption stated in 11 U.S.C. Sec. 522 (d).

Consistent with *Woodson*, this Court holds that California code of Civil Proce Section 704.100 (a) only exempts the *ownership* interest in an insurance or ann policy and does not exempt the *beneficiary* interest in an insurance or annuity po Consequently, if the annuity in issue were deemed, *arguendo*, to be "unmatur debtor would be entitled to claim an exemption in his ownership interest in annuity. However, debtor would not be entitled to claim an exemption in portion of the beneficiary interest – the 40 quarterly payments – payable under annuity.

To interpret California Code of Civil Procedure Section 704.100 (a) as de advocates would be both (1) inconsistent with the statutory scheme of exempti specified by California state law, and (2) contrary to public policy. It would allo debtor to put substantially all of his assets beyond the reach of his creditors, ra than only putting the finite dollar amount of assets specified by the exemption sche beyond the reach of his creditors.

California's statutory exemption system (California Code of Civil Procedure S 704.010 through Section 704.210 (West 1987) like that of most states, provide series of exemptions of specified dollar amounts relating to specific types of assets the debtor. These exemptions are not limitless, they are primarily (with excepti such as pain and suffering from personal injury) for quantifiable finite amounts. effect the California exemption statutory scheme sets up a "pot" of possi exemptions having a finite dollar amount. One exemption is the Homeste exemption, discussed *supra*. Others are exemptions of specified amounts for mo vehicles, household furniture, appliances, provisions, personal effects, jewelry, hea aids, tools used in the trade, deposit accounts, vacation credits, cemetery plots, e California Code of Civil Procedure Sections 704.010 - 704.210 (West 1989). One the specified exemptions is an exemption of a specified amount for life insuran policies, as provided for by California Code of Civil Procedure Sec. 704.100, here issue. There is also a catch-all maximum of $7,900 exemption, provided California Code of Civil Procedure Sec. 703.10(b)(1) and (5), sometimes referred as the "wild card" exemption, which exempts the:

"(1) The debtor's aggregate interest, not to exceed seven thousand, five hundr dollars ($7,500) in value, in real or personal property that the debtor or a depende of the debtor uses as a residence, in a cooperative that owns property that the debt or a dependent of the debtor uses as a residence, or in a burial plot for the debtor a dependant of the debtor.

(5) The debtor's aggregate interest, not to exceed in value four hundred dolla ($400) plus any unused amount of the exemption provided under paragraph (1), any property." California Code of Civil Procedure Sec. 730.140 (b) (1) (West 1987

Thus, the California exemption scheme contemplates that a *specified* dolla

nount of assets may be placed by the debtor beyond the reach of creditors. If the ebtor were correct that all assets may be placed beyond the reach of creditors– erely by converting them into a single premium deferred annuity–then there would e no need to have the rest of California statutory exemptions for specific items, ecause most assets could be sold and the cash raised to purchase an annuity or, in e case of items such as paid earnings (California Code of Civil Procedure Sec. 04.070), or deposit accounts (California Code of Civil Procedure Sec. 704.080) hich are already in liquid form, the cash could be withdrawn and used to purchase annuity. It is hornbook law that a statutory scheme should never be interpreted as to make parts of that statute or statutory scheme meaningless or redundant. *In Borba*, 736 F.2d 1317, 1320 (9th Cir. 1984); See also *Martinez v. Traubner* 32 Cal d 755, 187 Cal.Rptr. 251, 653 P. 2d 1046 (1982). To interpret the annuity section debtor contends would require making exactly this error in statutory construction, nce it would render many sections of the California Code of Civil Procedure xemption scheme, particularly the maximum $7,900 "wild card" exemption, uperfluous.

From a public policy point of view, the position urged by debtor is also untenable. he statutory aim of a Chapter 7 bankruptcy of an individual debtor such as Dr. loffat is to liquidate debtor's nonexempt assets in an orderly way for the benefit of ebtor's creditors and to allow debtor a fresh start by discharging debts to the extend ot paid by the liquidation of debtor's assets. E.G., *In re Tarnow*, 35 B.R. 1014 Bankr.N.d.Ind.1983), *reversed on other grounds*, 749 F.2d 464 (7th Cir. 1984). Debtor here seeks to obtain the discharge which constitutes this fresh start while eeping literally hundreds of thousands of dollars of his assets in the form of the forty ingle premium deferred annuity payments of $4,370 each, and while leaving ractically no assets to be liquidated for the benefit of creditors. To allow debtors to urchase single premium deferred annuities to protect all of a substantial portion of heir assets from liquidation, while receiving a discharge, would completely gut the ights of creditors in bankruptcy. This would be contrary to the bankruptcy statutory cheme, and clearly was not contemplated by the California state exemption scheme, which sought to provide exemptions for specified subject matters of finite dollar amounts. *See In re Krantz*, 97 B.R. 514 (Bankr. N.D.Iowa 1989) (refusing to sustain a claim of exemption in a case where a debtor purchased a $500,000 plus annuity policy as part of a conduct which the court found to be a fraud on creditors).

C. This Court Does Not Reach the Issue of Whether the Annuity May be Held Non-Exempt on the Ground that Its Purchase Constitutes an Alleged Fraudulent Conveyance

The Trustee also argues that his objection to the claim of exemption regarding the annuity must be sustained because the purchase of the single premium annuity policy

constituted a fraudulent conveyance pursuant to California law, specifically Califor Civil Code Section 3439.04.[15] California Civil Code Sec. 3439.04(a) provides tha transfer is fraudulent if the transfer is made:

(a) With actual intent to hinder, delay or defraud creditor of the debtor.

California Civil Code Sec. 3439.04(b) provides that a transfer is fraudulent if t transfer was made:

(b) without receiving a reasonably equivalent value in exchange for the tran or obligation and the debtor: . . .

(2) Intended to incur, or believed or reasonably should have believed that he or s would incur debts beyond his or her ability to pay as they became due.

Attempting to convert assets into exempt form obviously has the practical effect hindering creditors from being paid in the bankruptcy. However, such convers may not constitute "intent to hinder" creditors as that term is used in fraudul conveyance statutes, such as California Civil Code Sec. 3439.04(a), since t Congressional History regarding the part of the Code discussing exemptio specifically states that converting property from non-exempt to exempt form is n fraudulent as to creditors.[16] See *Matter of Smiley*, 864 F.2d 562, 566 (7th Cir. 198

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The Trustee is not attempting to set aside debtor's purchase of the annuity fr Executive Life or Debtor's transfer of the annuity to the Living Trust on the ground that these "transfers" constitute fraudulent conveyance. Instead, the Trustee is merely asking the court to disallow debtor's claim to an exemption the annuity on the ground that debtor's acquisition of the annuity on the groun that debtor's acquisition of the annuity would constitute a fraudulent conveyance. However, there is some question whether the issue of fraudulent conveyance is in procedurally proper form to be decided as an element of a motion to disallow exemption. The Bankruptcy Rules require that a proceedi to set aside a conveyance as fraudulent be raised by filing an adversary proceeding, not by a motion. Bankruptcy Rules 7001; 11 U.S.C. Sec. 548. Th Trustee might better raise a claim of fraudulent conveyance by bringing an appropriate adversary proceeding, rather than claiming that the fact a conveyance is fraudulent makes the property acquired by the conveyance non-exempt.

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However, as noted in *Smiley*, even if such a transfer is not a fraudulent conveyance, such a conversion within one year of filing may constitute "hindering creditors" as that term issued in Bankr. 11 U.S.C. Sec. 727(a)(2), s

citing to House and Senate Reports regarding the Bankruptcy Code's exemption scheme, as follows:

"As under current law, the debtor will be permitted to convert nonexempt property into exempt property before filing a bankruptcy petition. The practice is not fraudulent as to creditors, and permits the debtor to make full use of the exemptions to which he is entitled under the law." *(Citations omitted) Matter of Smiley,* 864 F.2d at 566.

However, the Congressional history just cited does not address California's specific fraudulent conveyance statute here in issue, California Code of Civil Procedure Sec. 3439.04. Moreover, in addition to the question of whether there was intent to hinder as required by California Civil Code Sec. 3439.04(a), there is the question of whether the purchase of the annuity was fraudulent under California Civil Code Sec. 3439.04(b), which deals with purchases made for less than fair consideration.

Here, the purchase was not for fair consideration. (See California Civil Code Sec. 343.03) defining fair consideration. Debtor paid $190,000 to receive ten years of payments totaling $174,000. Taking into account a discount of 10%, the actual present value of the payments would be $112,441, or $77,559 less than the debtor paid. This is not fair consideration. Debtor was so intent on keeping his creditors from being paid that he decided he would rather lose $75,000 than have it go to his creditors. The analysis of debtor's schedules, of which the Court takes judicial notice, reflects that the purchase of the annuity in question rendered debtor insolvent. Thus, the transaction would appear to be fraudulent under California Civil Code Sec. 3439.04(b), which does not require actual intent to hinder or defraud creditors.

However, even if the annuity purchase was held to be a fraudulent conveyance, it is unclear whether or not being a fraudulent conveyance would make the annuity nonexempt. Consistent with the legislative history of the code quoted *supra*, Ninth Circuit cases hold that changing nonexempt to exempt assets on the eve of bankruptcy to place them beyond the reach of creditors ("pre-bankruptcy planning") is allowable. E.g., *Grover v. Jackson, In re Jackson,* 472 F.2d 589 (9th cir. 1973); *Wudrick v. Clements, In re Wudrick,* 451 F2d 988 (9th Cir. 1971). See *In re Krantz,* 97 B.r. 514, 531 (Bankr.N.D.Iowa 1989) (sustained objection to exemption because

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as to constitute grounds for denying a discharge under Bankr. 11 U.S.C. Sec. 727(a)(2). See *In re Oberst,* 91 B.R. 97 (Bankr.C.D.Cal.1988). The court does not address the question of whether the conduct here in issue would be grounds for denying debtor a discharge under Bankr. 11 U.S.C.Sec.727 (as some courts have done) since that issue would have to be raised by bringing an adversary proceeding. E.g., *In re Tveten,* 70 B.R.529 (Bankr. D.Minn. 1987).

debtor's conduct in converting nonexempt to exempt property was done with inter to hinder, delay or defraud creditors, and rose to the level of extrinsic fraud); an *Matter of Armstrong*, 93 B.R. 197, 203 (Bankr.D. Neb.1988) (claim of exemptio sustained unless activities of debtor exhibited "extrinsic fraud").[17] Because th Court has held that neither the ownership interest nor the beneficial interest in th annuity is exempt, for the reasons stated in part III C, *supra*, this Court does not nee to reach, and does not reach, the questions of (1) whether the conveyance i fraudulent under either California Civil Code Sec. 3439.04(a) or (b); or (2) whether if the annuity were held to have been purchased by a conveyance that wa fraudulent, that fact, or debtor's whole course of conduct, would constitute actua fraud or extrinsic fraud so as to constitute a sufficient ground to deny the exemption

This opinion constitutes the Findings of Fact and Conclusions of Law of the Court

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In re Gordon H. MOFFAT, Debtor.
Gordon H. MOFFAT, Appellant,
v.
David R. HABBERBUSH, Appellee.
BAP No. CC-89-2062-POMe.
Bankruptcy No. LA 88-20019-KM.

United States Bankruptcy Appellate Panel
of the Ninth Circuit.
Argued and Submitted on June 25, 1990.
Decided Aug. 31, 1990.

Chapter 7 trustee objected to exemptions claimed by debtor in principal residence and annuity purchased in preparation for bankruptcy filing. The Bankruptcy Court, Kathleen March, J., 107 B.R. 255, sustained objection in part and overruled it in part, and appeal was taken. The Bankruptcy Appellate Panel, Perris, J., held that: (1)

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Ninth Circuit cases decided after *Wudrick* discussing conversion of nonexempt to exempt assets impliedly, though not expressly, seem to preserve this "actual fraud" exception, because they state that conversion of assets from nonexempt to exempt status is not *per se* fraudulent. This leaves open the idea that the total course of conduct in addition to the conversion itself, may rise to the level of actual or extrinsic fraud. E.g., *Grover v. Jackson (In re Jackson)* 472 F.2d 589, 590 (9th Cir. 1973); *Wetzel v. Idaho State Bank, (In re Smith)* 366 F.Supp. 1213, 1218 (D.Idaho 1973).

annuity had matured prior to date of debtor's bankruptcy petition, and therefore, payments under annuity were exempt under California law only to extent that they were needed for support of debtor and his dependents, and (2) payments received by Chapter 7 debtor from annuity policy were not "reasonably necessary" for support of debtor and his spouse, and thus, could not be claimed as exempt under California law. Affirmed.

1. Exemptions 49

Annuity had matured prior to date of debtor's bankruptcy petition, and therefore, payments under annuity were exempt pursuant to California law only to the extent that they were needed for support of debtor and his dependents, where annuity was designated on its face as immediate annuity, annuity took effect three days after issue date, and initial quarterly payment was made at end of initial quarterly income period. West's Ann.Cal.C.C.P. Sec. 704.100.

2. Exemptions 49

Payments received by Chapter 7 debtor from annuity policy were not reasonably necessary for support of debtor and his spouse, and thus, could not be claimed as exempt under California law, where debtor's monthly income of more than $5,000 was enough to meet expenses, including debt service on his residence, and even though debtor's age and medical condition suggested that monthly income would not continue into distant future, there was no indication that income would not continue for next few years. Bankr. Code, 11 U.S. C.A. Sec. 701 et seq.

Richard M. Moneymaker, Los Angeles, Cal. For appellant. David R. Haberbush, Los Angeles, Cal., for appellee.

Before PERRIS, OLLASON and MEYERS, Bankruptcy Judges.

OPINION

PERRIS, Bankruptcy Judge:

This appeal concerns the bankruptcy trustee's objection to the debtor's claimed exemption in a $190,000 single premium immediate annuity. The bankruptcy court determined that the subject annuity is a matured annuity and not reasonably necessary to support the debtor and his spouse and therefore was not exempt. 107 B.R. 255. The debtor appeals from the order. We affirm.

FACTS

The debtor, Gordon H. Moffat ("the debtor") is a practicing orthodontist who earns a gross monthly salary of approximately $5,000 and monthly take-home pay of approximately 44,000 from his wholly owned and operated professional corporation. In addition, the debtor receives $1,000-$1,500 a month as a consultant for an insurance a month as a consultant for an insurance company and 4800 a month in Social Security payments. The debtor's wife receives a gross monthly salary of $600.

Although the debtor testified that he was developing glaucoma and had heal problems in the past, there is no medical opinion evidence that this, or any oth condition, will impair the debtor's practice, nor any testimony that the debtor woul be otherwise unable to continue to carry on his practice for the foreseeable future

On February 5, 1988, the debtor and his spouse created "The Gordon H. Moff and Barbara B. Moffat Living Trust" ("Living Trust"). The debtor, his spouse and the children are the trust beneficiaries. The debtor transferred title of his persona residence to the Living Trust.

On February 28, 1988, the debtor borrowed $300,000 against his home an utilized 4190,000 of the proceeds to purchase a single premium immediate annuit policy ("the annuity" or "the policy").[18] The policy's issue date is June 28, 1988, an its effective date is July 1, 1988. The policy calls for a minimum of 40 quarterl payments of $4,370 to commence on October 1, 1988. The debtor, as th designated "owner" and annuitant is entitled to receive these payments for as long a he lives. In the event the debtor dies before receiving the 40 quarterly payments ove the 10 year period, the policy's designated beneficiary, the debtor's spouse, wi receive the remaining payments.

Subsequently, the debtor transferred his ownership interest in the annuity to th Living Trust. The debtor testified that he and his spouse created the Living Trust an purchased the annuity on the advice of counsel in order to keep his creditors fron reaching these assets by maximizing allowable exemptions. Prior to the abov transaction, the debtor had a monthly mortgage payment of $1,600. After thi transaction, the debtor has a monthly mortgage payment of 42,600. The debto maintains that he needs the $4,370 quarterly annuity payment in order to service th debt on his home.

The debtor filed a Chapter 7 petition on September 21, 1988 and claimed exempt, *inter alia*, the annuity under California Code of Civil Procedure ("C.C.P. Sec. 704.100. The Chapter 7 trustee, David Habberbush, ("the trustee") objected t this claimed exemption. Following an evidentiary hearing, the bankruptcy cou entered a Memorandum Decision that, *inter alia*, disallowed the debtor's claime exemption in the annuity. The debtor filed this timely appeal.

ISSUES

The ultimate issue in this appeal is whether the debtor is entitled to claim a exemption in the annuity under C.C.P. Sec. 704.100. Resolution of this issue require

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[18] Although the bankruptcy court states that the subject annuity is a single premium deferred annuity, the face of the annuity policy clearly states that it is an immediate annuity.

consideration of two sub-issues: (1) Whether the annuity had matured prior to the date of the petition; and (2) Whether the payments received from the annuity are reasonably necessary for the support of the debtor and his spouse.

STANDARD OF REVIEW

Whether the annuity matured prior to the date of the petition is a legal question. Such a question is subject to *de novo* review. *See In re Lewis*, 79 B.R. 893, 895 (9th Cir. BAP 1987). Whether the annuity is reasonably necessary for the support of the debtor and his spouse is a factual question that we review for clear error. See Bankruptcy Rule 8013.

DISCUSSION

California Code of Civil Procedure, section 704.100 provides, in relevant part, as follows:

(a) Unmatured life insurance policies (including endowment and annuity policies), but not the loan value of such policies, are exempt without making a claim.

* * * * * *

[c] Benefits from matured life insurance policies (including endowment and annuity policies) are exempt to the extent reasonably necessary for the support of the judgment debtor and the spouse and dependents of the judgment debtor.

The bankruptcy court determined that the exemption was not available under section 704.100 because the annuity had matured and the payments were not reasonably necessary for the support of debtor and his spouse. The court alternatively concluded that even if the annuity had not matured, the debtor could not claim an exemption in any interest in the annuity because section 704.100(a) exempts only the ownership interest in unmatured annuity policies and the payments which the debtor sought to exempt were part of the beneficial interest.[19] We do not consider the bankruptcy court's analysis of the exemption of unmatured annuity policies under section 704.100 (a) because the bankruptcy court did not commit reversible error in determining that the annuity at issue matured prior to the date of the petition and that the annuity is not reasonably necessary for the debtor's support.

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The court also determined the debtor was entitled to a $30,000 homestead exemption in his residence and that it would not decide whether the purchase of the annuity was a fraudulent conveyance. Neither of these decisions are raised as issues on appeal. Similarly the parties do not raise any issue regarding whether exemption planning, if any, in this case would bar the exemption or preclude the debtor's discharge.

1. *Whether the annuity had matured prior to the date of the petition.*[20]

[1] The debtor contends that the annuity had not matured as of the date o petition because maturity require that there be no further conditions to payment the debtor's continued life was a condition to the payments. The Trustee cont that the annuity had matured because all contingencies prerequisite to payment occurred prior to the petition. Neither the parties nor the court cite relevant case dealing with maturity date of an annuity. Our research similarly uncovered no law. Based upon the fundamental characteristics of annuities, the partic characteristics of the annuity at issue and the plain meaning and application o term "mature," we believe that the annuity at issue matured prior to the date o petition.

An annuity contract, in general, is one by which an annuitant makes an investm which will assure his receipt of a specified annual or quarterly sum during his life if he should die prematurely, his estate or those whom he designates will receive payments he has not yet received. *See e.g., Garos v. State Tax Commission*, 99 N 319, 321, 109 A.2d 844, 847 (1954). A fundamental characteristic of an "annu is a periodic payment made unconditionally without any contingency. *In re Luck Estate*, 151 C.A.2d 481, 487, 312, P.2d 24, 29-31 (1957).

Annuities are classified upon various bases, including the structure of payme made to the annuitants. *See generally California Insurance Law and Practice* sect 20.20-20.21 (Matthew Bender 1990) (hereafter *"California Insurance"*). Classifica according to the structure of payments made to annuitants depends upon factors s as the events which trigger the discontinuation of payments[21] and, more importa

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[20] The debtor's exemption rights under state law are determined as of the date o the petition. *In re Seyfert*, 97 B.R. 590 (Bankr. S.D.Cal. 1989); *see In re Magallanes*, 96 B.R. 253, 255 (9th Cir. BAP 1988).

[21] For example, annuities may be either straight life annuities, the payments upo which will terminate upon the death of the annuitant regardless of how long h or she lives, annuities certain, the payments upon which will terminate at the e of a specified number of years regardless of how long the annuitant lives, or period certain guaranteed minimum annuities, the payment upon which will continue for the longer or a specified number of years or the annuitant's life. *See California Insurance Sec. 20.21[2].* The annuity at issue is a period certai guaranteed minimum annuity because the insurance company will make payments to the debtor as long as he lives, but if the debtor dies prior to the en

for purposes of determining maturity, the commencement of the benefits paid to an annuitant. *See California Insurance Sec.* 29,21[2]-[3].

With regard to the commencement of benefits, there are two types of annuities: (1) immediate annuities, in which the payment of benefits begins a short period of time after the premium has been paid to the company, usually at the beginning or end of the first income period; and (2) deferred annuities, in which the payment of benefits begins on some future stated date. Id. At Sec. 20.21[3]. As stated in *California Insurance*, Sec. 20.21[3][b], "[d]eferred annuity contracts permit the annuitant to delay the maturity date of the annuity [the date on which payments commence) . . ." Although neither *California Insurance* nor other authorities discussed the definition of maturity with respect to annuities, the quoted statement conveys the impression that it is generally accepted that the maturity date of an annuity is the date upon which the benefits under the annuity begin to accrue and that an immediate annuity will be mature upon its effective date.

In this case, the annuity at issue is designated on its face as an immediate annuity. This designation is consistent with the annuity's terms because it took effect on July 1, 1988, three days after the issue date and the initial quarterly payment was to be made on October 1, 1988, at the end of the initial quarterly income period. Thus, although the initial payment was not to be made until October 1, 1988, the benefits, as well as the right to payment commenced on July 1, 1988, the beginning of the quarter for which the initial payment was made, and the annuity matured on that date.

This conclusion is also consistent with the plain meaning of "maturity" and similar terms. *Black's Law Dictionary* defines "maturity" as "the date at which . . .an obligation becomes due" and defines a "matured claim" as a "[c]laim which is unconditionally due and owing." *Black's Law Dictionary* 883 (5th Ed. 1979). In this case, the company's duty to pay arose on the effective ate of the annuity, even though the first payment was not to be made until three months later. Although it was not certain that the payments would be made to the debtor, as opposed to his designated beneficiary if he died within the 10 year period, on the July 1 effective date, there was no pre-condition to the company's obligation to make the payments under the annuity. On that date, the debtor possessed an enforceable right to receive payments, even though the debtor would not receive the first quarterly payment for the July-September, 1988 quarter until October 1, 1988. Given the enforceable right and the absence of conditions to the company's obligation to pay, the annuity matured on

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of the ten year period, the company will make payments to his wife, the designated beneficiary, for the duration of the ten year period.

July 1, 1988.

The conclusion that the annuity matured on July 1, 1988 is not altered by the debtor's analogy of an annuity to life insurance. Although both annuity polices such as this one and life insurance policies are similar in that they both involve an element related to the annuitant's or insured's life, in life insurance contracts, the liability of the company will arise upon the death of the insured. *See California Insurance, Sec.* 20.21[2]. This death is a pre-condition to the liability of the company and until the death occurs, the liability of the company will be, at the most, conditional and consequently unmatured. By contrast, the death of the annuitant is not a pre-condition to the company's obligation to pay. Rather, it is an event that will either terminate the obligation to pay or, in this case, transfer that obligation to a different party.

Nor do the debtor's other arguments with respect to maturity alter the above conclusion. The debtor argues that under the definition of maturity adopted above, all life insurance contracts and annuities would be mature on their date of purchase. Although this may be the case as to immediate annuities, this is not the case as to life insurance policies or deferred annuities. As mentioned above, life insurance policies will not mature until the pre-condition of the insured's death has occurred. Deferred annuities will not mature until the future designated date comes to pass. The debtor also relies upon the trustee's purported stipulation that the annuity was not mature on the date of the petition. A review of the record, however, discloses that this stipulation is far from clear.[22]

The debtor's public policy arguments are unpersuasive. In *In re Woodson,* 839 F.2d 610, 618-19 (9th Cir. 1988), the Ninth Circuit explained the policy reasons underlying bankruptcy law's distinction between an unmatured policy and a matured policy. While an unmatured policy may have value to the debtor and its loss could cause the debtor to incur replacement costs, an unmatured policy will have no value to the estate other than its loan value, which is not exempt. On the other hand, proceeds from a matured policy have value to the estate and can be used to pay creditors. The stream of payments arising from the annuity at issue in this case would have value to the estate. Any public policy arguments, therefore, support the conclusion that the policy is matured.

In summary, upon considering fundamental principles of annuity law, the plain

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[22] The record discloses that immediately after making the statement giving rise to the purported stipulation, the trustee indicated that he disputed that the annuity policy was not matured on the date of the petition. See Excerpts of Record at 241.

aning of the term "matured" and the public policy concerns, the annuity at issue atured on July 1, 1988, when the right to payment arose in the sense that the nefits began to accrue. Thus, the annuity matured prior to the September 21, 1988 tition.

2. *Whether the payments received from the annuity are reasonably necessary for the support of the debtor and his spouse.*

[2] Neither the parties nor the bankruptcy court cite any authority dealing with the terpretation of the term "reasonably necessary for support" under section 4.100(c). Similarly, our research uncovered no authorities dealing with this estion. In similar contexts, however, courts have set forth a number of factors to e in determining whether a given asset is reasonably necessary for the debtor's pport. *See, e.g., In re McCabe*, 74 B.R. 119, 122 (Bankr. N.D. Iowa 1986). These tors include the following: the debtor's present and anticipated living expenses and come; the age and health of the debtor and his or her dependents; the debtor's ility to work and earn a living; the debtor's training, job skills and education; the btor's other assets and their liquidity; the debtor's ability to save for retirement; and y special needs of the debtor and his or her dependents. *Id.* In addition, C.C.P. c. 703.115 requires that, in determining exemption based upon the need of the btor and his spouse and dependents, the court should take into account the operty of the judgment debtor's spouse and dependents.

We do not believe that the bankruptcy court committed clear error in determining t the annuity payments are not reasonably necessary for the support of his debtor d his spouse. There is no contention that the debtor's monthly income of more n $5,000 is not enough to meet expenses,[23] including the debt service payments the residence. Although the debtor's age and medical condition suggest that this nthly income would not continue into the distant future, there is no indication that income would not continue at this level, or at least at a lever greater than the nthly social security payments, for the next few years. The debtor had a $30,000

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hough the bankruptcy court admitted into evidence a statement of the tor's current income and expenses, that statement was not included in the ord on appeal. That factor alone means that we cannot conclude that the kruptcy court's determination was clearly erroneous. *See In re Burkhart*, 84 658, 660 (9th Cir. BAP 1988).

interest in his home as another significant exempt asset.[24] In addition, the debtor's spouse had substantial interest in the home through her 485 interest in the Living Trust. Given the debtor's assets income and expenses, we affirm the bankruptcy court's finding regarding the necessity of the annuity for the debtor's support.

CONCLUSION

We determine (1) that the annuity at issue matured on its effective date, prior to the bankruptcy petition and (2) that the bankruptcy court did not clearly err in finding that the annuity is not necessary for the support of the debtor and his spouse. The annuity, therefore, is not exempt under section 704.100 and we affirm the bankruptcy court's determination.

In re Gordon H. MOFFAT, Debtor.
Gordon H. MOFFAT, Appellant,
v.
David Richard HABERBUSH, Appellee.
No. 90-56134.

United States Court of Appeals, Ninth Circuit.
Argued and Submitted Oct. 8, 1991.
Memorandum Filed Dec. 12, 1991.
Order and Opinion Filed March 20, 1992.

Trustee objected to exemption claimed by Chapter 7 debtor in annuity purchased in preparation for bankruptcy filing. The Bankruptcy Court, 107 B.R. 255, determined that payments received from annuity were not reasonably necessary to support debtor and spouse within meaning of California exemption. Debtor appealed. The Bankruptcy Appellate Panel, 119 B.R. 201, affirmed. The Court of Appeals, T.G. Nelson, Circuit Judge, subsequently filed opinion holding that annuity was matured annuity and not reasonably necessary to support debtor and his spouse and, therefore, was not exempt from inclusion in bankruptcy estate under California law.

Affirmed.

1. Bankruptcy 2549

Annuity policy purchased by debtor in anticipation of bankruptcy was matured annuity and was property of Chapter 7 estate pursuant to California law, where debtor

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[24] The bankruptcy court also cited the debtor's ability to sell his practice in the future. It is doubtful, however, that this asset should be applied to the debtor's support because to the extent the stock in the debtor's professional corporation has any value, it apparently is property of the estate.

chose to have payout period commence on October 1, 1988, following the filing date of his Chapter 7 petition on September 21, 1988; annuity matured on its effective date prior to filing of petition. West's Ann. Cal. C.C.P. Sec. 704.100.

2. Exemption 37

Immediate annuity purchased by Chapter 7 debtor in anticipation of bankruptcy was not reasonably necessary for support of debtor and souse so as to be exempt from bankruptcy estate under California law, given debtor's assets, income and living expenses. West's Ann. Cal. C.C.P. Sections 704.100, 704.100(c).

Richard M. Moneymaker, Moneymaker & Kelley, Los Angeles, Cal., for appellant.
Peter C. Anderson, Roquemore, Pringle & Moore, Los Angeles, Cal., for appellant.
Appeal from Ninth Circuit Bankruptcy Appellate Panel.
Before BROWNING, ALARCON and T.G. NELSON, Circuit Judges.

ORDER

The memorandum disposition filed December 12,1991, is redesignated as an authored opinion by Judge T.G. Nelson with minor modifications within the text.

OPINION

T.G.NELSON, Circuit Judge:

Debtor Dr. Gordon H. Moffat appeals from the Bankruptcy Appellate Panel's (BAP's) affirmance of the bankruptcy court's determination[25] that the annuity at issue is a matured annuity and not reasonably necessary to support the debtor and his spouse, and therefore not exempt from the inclusion in the bankruptcy estate under California Code of Civil Procedure (C.C.P.) Sec. 704.100. We affirm.

On February 28, 1988, debtor borrowed $300,000 against his home and used $190,000 of the proceeds to purchase a single premium immediate annuity, naming himself as the annuitant and his wife as the contingent beneficiary. The issue date of the annuity was June 28, 1988, and the effective date was July 1,1988. Debtor chose to have the payout period for the 40 quarterly payments of $4,370 commence on October 1, 1988, following the filing date of his Chapter 7 bankruptcy petition on September 21,1988.

[1] After independent review, we agree with the BAP that the payout date chosen by the debtor cannot rationally be deemed to make the policy unmatured as of the date of filing the bankruptcy petition. The annuity policy provided for immediate payment following bankruptcy planning. Given the debtor's enforceable right to

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The bankruptcy court decision is reported at *In re Moffat*, 107 B.R. 255 (Bankr.C.D.Cal.1989). BAP's opinion is found at *Moffat v. Habberbush* (sic), 119 B.R. 201 (9th Cir. BAP 1990).

receive payments and the absence of conditions to the company's obligation to pay the annuity matured on its effective date, July 1, 1988, prior to the September 21 1988, petition. The annuity and the California statute would have to be interpreted more than liberally to uphold the claim of exemption by the debtor in this case.

We have considered, and are not persuaded by, debtor's argument that the trustee stipulated in court that the policy was unmatured. *See Habberbush,* 119 B.R. at 205-206. (A review of the record indicates that the trustee "disputed that the annuity was not matured on the date of the petition" following the statement that gave "rise to the purported Stipulation.")

In addition, unlike *In re Cheng,* 943 f.2d 1114 (9th Cir.1991), there is no conflict in this case between the bankruptcy court's approach and the plain language of the statute. We need not and do not reach the issue of whether the policy is exempt because the purchase was allegedly not a fraudulent conveyance.

[2] Benefits from matured life insurance policies, including annuity policies "are exempt to the extent reasonably necessary for the support of the judgment debtor and spouse and dependents of the judgment debtor." C.C.P. Section 704.100 (c). However, given the debtor's assets, income and living expenses, and other evidence at trial, the bankruptcy court did not clearly err in finding the annuity payments were not reasonably necessary for the support of debtor and his wife. As the bankruptcy court explained, "[i]f debtor has excessively incumbered his residence with consensual liens, he may lose the residence, or he may use the 47,900 gross monthly income he and his wife have from their work and other sources to continue paying the higher monthly mortgage." *In re Moffat,* 107 B.R. at 262.

AFFIRMED.

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XVI. RES JUDICATA

A. In General. 1. [Sec.280] Nature of Doctrine

The doctrine of *res judicata* gives certain *conclusive effect* to a *former judgment* in subsequent litigation involving the same controversy. It seeks to curtail multiple litigation causing vexation and expense to the *parties* and wasted effort and expense in *judicial administration.* It is well established in common law and civil law jurisdictions, and is frequently declared by statute. (See generally C.C.P. 1908, 1908.5, 1911; *Goddard v. Security Title Ins. & Guarantee Co.* (1939) 14 C.2d 47, 51, 92 P.2d 804; *Sutphin v. Speik* (1940) 15 C.2d 195, 201, 99 P.2d 652, 101 P.2d 497; *Bernhard v. Bank of America* (1942) 19 C.2d 807, 810, 122 P.2d 892, infra, Sec. 410; *Panos v. Great Western Packing Co.* (1943) 21 C.2d 636, 637, 134 P.2d 242; *French*

v. *Rishell* (1953) 40 C.2d 477, 480, 254 P.2d 26; *Estate of Spinosa* (1953) 117 C.A.2d 364, 367, 255 P.2d 843; *Teitelbaum Furs v. Dominion Ins. Co.* (1962) 58 C.2d 601, 25 C.R. 559, 375, P.2d 439, infra, Sec. 332; *commissioner v. Sunen* (1948) 333 U.S. 591, 68 S.Ct. 715, 719, 92 L.Ed. 894, 905; *United States v. Munsingwear* (1950) 340 U.S. 36, 71 S.Ct. 104, 95 L.Ed. 36; *Busick v. Work. Comp. App. Bd.* (1972) 7 C.3d 967, 972,104 C.R. 42, 500 P.2d 1386, infra, Sec. 344, quoting the text; *Wood v. Herson* (1974) 39 C.A. 3d 737,745, 114 C.R. 365, citing the text; *Shuffer v. Board of Trustees* (1977) 67 C.A. 3d 208, 216, 136 C.R. 527 quoting the tex; *De Weese v. Unick* (1980) 102 C.A. 3d 100, 105, 162 C.R. 259, citing the text; *Nakash v. Superior Court* (1987) 196 C.A. 3d 59, 67, 241 C.R. 578, infra, Sec. 349, quoting the text; *California Coastal Com. V. Superior Court* (1989) 210 C.A. 3d 1488, 1498, 1499, 258 C.R. 567; on the distinct doctrines of law of the case and stare decisis, see 9 *Cal. Proc.* (4th), *Appeal* Sections 895 et seq., 917 et seq.; on election of remedies, see 3 *Cal. Proc.* (4th), *actions,* Section 174 et seq.

A great deal of commentary is available in law reviews and treatises. (See James 4th, Chap. 11; 47 Am.Jur.2d (Rev.ed) Judgments Sec. 514 et seq.; 65 Harv. L.Rev. 818 [extensive discussion]; 56 Harv. L.Rev. 1; 103 Harv. L. Rev. 1989 [claim preclusion in modern latent disease cases]; 40 Cal, L. Rev. 412; 47 So. Cal. L. Rev. 357 [expansion of doctrine in multi-party litigation]; 30 Hastings L.J. 191 [New Standards for Evaluating the Effect of a Change in Law After Judgment].)

A definitive modern treatment of the subject is available in the Second Restatement of Judgments, Chapters 3 and 4.

2. **[Sec. 281] Scope and Effect.**

Subject to some exceptions and qualifications, the doctrine applies to:

[a] Judgments of *every kind of court,* local or foreign. (See infra, Sec. 293 et seq.)

[b] *All types of final judgments* on the merits. (See infra, Sec. 306 et seq.)

[c] *Parties persons in privity,* and, to a limited extent, strangers. (See infra, Sec. 388 et seq.)

The doctrine has "a double aspect":

First, in a new action on the *same cause of action,* a prior judgment for the defendant is a complete *bar* (infra, Sec. 348 et seq.). A prior judgment for the plaintiff likewise precludes the new action because it results in a *merger,* superseding the plaintiff's claim by a right of action on the judgment (infra, Sec. 342 et seq.).

Second, in a new action on a *different cause of action,* the former judgment is not a complete merger or bar, but is effective as a *collateral estoppel,* i.e., it is conclusive on issues actually litigated between the parties in the former action. (See infra, Sec. 354 et seq.) (On conclusive determination of issues in a new action on the *same claim* (direct estoppel), see infra, Sec. 285.)

Res judicata is not a jurisdictional defense, and may be waived by failure to raise

it in the trial court. (See 2 *Cal.Proc.* (4th) *Jurisdiction*, Sections 106, 107; infra, Sec. 291.)

3. Restatement Second.

(a) **[Sec. 282] Scope and Terminology.**

Chapter 1 (Introduction) of the Second Restatement of Judgments contains a comprehensive analysis of the purposes and effects of the doctrine of res judicata, and also discusses the scope, organization and terminology used.

(1) *In General.* The Second Restatement uses the term *"claim preclusion"* for the primary aspect of res judicata, and *"issue preclusion"* for collateral estoppel. "*`Preclusive effects'* refers to limitations on the opportunity in a second action to litigate claims or issues that were litigated, or could have been litigated, in a prior action. In general terms, these limitations include the rules of claim preclusion and issue preclusion and the concept of `privity.' The *rule of claim preclusion*, see Sections 18 to 26, is that a party ordinarily may not assert a civil claim arising from a transaction with respect to which he has already prosecuted such a claim, whether or not the two claims wholly correspond to each other. The *rule of issue preclusion*, sometimes referred to as collateral estoppel, see Section 27 and 28, is that a party ordinarily may not relitigate *an issue* that he fully and fairly litigated on a previous occasion. The *concept of `privity'* refers to a cluster of relationships, see Section 34 to 61, under which the preclusive effects of a judgment extend beyond a party to the original action and apply to *persons having specified relationships* to that party, for example, the relationship of successor interest." (Chapter 1, p. 1.)

(2) *Civil Judgments.* The Restatement deals only with the effects of prior adjudications in civil litigation. (A) "it thus includes the effect in a civil action of a prior adjudication by *an administrative tribunal*, see Sec. 83, the effect of *an arbitral decision*, see Sec. 84, and the effect in a civil action of a *prior criminal adjudication*, see Sec. 85." (Chapter 1, p. 2) (b) The rules also apply, with certain qualifications, to the effect to be given a judgment when the *subsequent proceeding* is before an *administrative tribunal.* (Chapter 1,p.2)

(3) *Sister Jurisdiction Judgments.* (a) The rules focus primarily on preclusion questions arising within a single legal system; i.e., the effect in a state court of a prior judgment rendered in a court of that state, and the corresponding situation within the federal judicial system. "This set of problems may be called the intramural law of res judicata, in contrast to the problems arising in connection with recognition of a judgment of a sister jurisdiction." (Chapter 1, p.2) (b) Recognition of sister state judgments is dealt with in the Second restatement of Conflict of Laws, and recognition of foreign country judgments is dealt with in the Second Restatement of Conflict of Laws and the Restatement of Foreign Relations Law of the United States. (Chapter 1, p.2.)

[b] [Sec. 283] Other Rules of Estoppel.

The terms "res judicata" and "collateral estoppel" have sometimes been used to refer to some other and distinct forms of estoppel.

(1) Where a party attempts to take inconsistent positions with regard to a claim or contention arising in concurrent or successive actions, he is often held estopped to contradict in one action a position taken in other litigation. "Such an estoppel may be imposed under the doctrine of *election of remedies*, or a rule of evidence or candor toward the court that a party may not assume *inconsistent positions*, or a rule denominated as *estoppel in pais*. Estoppel imposed under such rubrics does not rest on the fact that a court has determined the claim or contention in question, for the estoppel is imposed on the basis of *events occurring before adjudication actually takes place. Rather, the basis of the estoppel is the unfair advantage* that may accrue to a party from the possibility that the claim or contention might be differently resolved in adjudications that are separately conducted." (Chapter 1, p.4.)

(2) A related form of estoppel occurs when a party has made a *concession or admission* in prior litigation and in a subsequent action seeks to controvert it; in some decisions, the admission is treated as conclusive, in others as prima facie evidence or a rebuttable presumption. "Here, too, the results may be justified, but they flow from the *conduct of the party* and not from a decision of the matter by a court." (Chapter 1, p.5.)

(3) A person who is *not a party* to litigation, but who indicates that he will conform his conduct according to a judgment between others, may be *estopped from later pursuing an inconsistent claim*. "This situation involves a *true estoppel* and not claim or issue preclusion, for a non-party ordinarily is not bound under res judicata by litigation to which he is not a party. It is dealt with in this Restatement because many courts in applying a rule of estoppel in such situations use the language of res judicata, particularly the term `privity.' It is hoped that the recognition of the distinctions involved may clarify both the concept of *estoppel in pais* and the concepts of *claim and issue protection.*" (Chapter 1, p.5; see Rest.2d, Judgments Sec. 62.)

[c] [Section 284] Res Judicata and Law of Procedure.

(1) Despite the creation of the field Code of 1848 and the later adoption of the Federal Rules of Civil Procedure, the law of res judicata has remained largely the product of decisional law, which took only belated account of major legislative changes. "One of the chief tasks of Restatement is to state the law of res judicata in terms coordinate with the legislative systems of procedure now in general use, i.e., the Federal Rules and state systems closely similar to them."

(2) "The complementary relationship between the law of procedure and the law of

res judicata is not difficult to explain. The law of res judicata expresses essentially simple principles, even though the implications of those principles are often complex. The principle underlying the rule of claim preclusion is that a party who once has a chance to litigate a claim before an appropriate tribunal usually ought not to have another chance to do so. A related but narrower principle–that one who has actually litigated an issue should not be allowed to relitigate it–underlies the rule of issue preclusion. The legal and social purposes served by these principles will be referred to presently. The very statement of them, however, shows their dependence in presuppositions about the law of procedure. The `chance' to litigate is not simply some unspecified opportunity for disputation over legal rights; it is the opportunity to submit a dispute over legal rights to a tribunal legally empowered to decide it according to definite procedural rules. Any less formal process would be regarded as either legally inconclusive–that is, not a serious and genuine `chanc' to litigate–or fundamentally unfair. Indeed, a procedure for ventilating a legal dispute that lacks certain minimal elements of form will be treated as inconclusive for the reason that it is fundamentally unfair. Putting the point differently, it may be a denial of Due Process to treat an undefined procedural mechanism as yielding a conclusive result in determination of legal rights." (Chapter 1, p.6.)

(3) "The law of res judicata expresses the terms for assessing whether the procedural system afforded the contending party an adequate opportunity to litigate. In the now accepted phrase, the question is whether that opportunity was `full and fair.' Modern civil procedure usually does provide full and fair freedom to present substantive contentions and full and fair access to evidence. Accordingly, under that system of procedure there must be compelling reasons to sustain a plea for a second chance. Such is the general tenor of this Restatement." (Chapter 1, p.9.) Thus, "the policy of the modern law of res judicata is summed up in Sec. 26(f) of this Restatement, allowing relitigation of a claim (except on other specific grounds) only if it is `clearly and convincingly shown that the policies favoring preclusion of a second action are overcome for an extraordinary reason.'" (Chapter 1, p.10.) (See *Gouvis Engineering v. Superior Court (Cambridge Terrace Owners' Assn.)* (1995) 37 C.A. 4th 642, 650, 43 c.r.2d 785, citing the text.)

(4) "[W]hen the rules of original procedure constrain the first opportunity to litigate, the rules of res judicata are adjusted reciprocally. In some types of courts of limited jurisdiction and some types of administrative agencies, for example, the scope of substantive inquiry and the potential for development of evidence are much more restricted than the corresponding opportunity afforded in a court of general jurisdiction in a comparable case. The results of res judicata with respect to the judgments of such tribunals are correspondingly less restrictive. See Sections 26(c), 28 [c] and 83, Comment f." (Chapter 1,p.10.)

(5) "However formulated and applied, the basic principle of res judicata reflects a fundamental paradox. The law of res judicata endows judgments of courts with a peculiar finality: They are immune from examination by other authorities and may be reexamined by the courts themselves only in unusual circumstances. Yet this finality attaches not because the courts are infallible but because they are inevitably fallible. Adjudication is a procedure by which a disinterested agency–the judge or jury–is authorized to impose a binding resolution of a controversy or ver legal rights. Arriving at such a resolution requires either a determination of the facts or a particularization of the law as it applies to facts, or both. If there were infallible personages who could discern law and facts in a way that engendered universal assent, the process of adjudication would be socially unnecessary. Legal disputes could simply be remanded to the oracles. It is because such personages do not exist that the offices of judge and jury and a system of procedure are created by law, supplying by fiat a practical substitute for perfect intelligence." (Chapter 1, p.10.)

(6) "Finality, then, is the service rendered by the courts through operation of the law of res judicata. The finality in contemplation includes the immediate finality that is imposed on the litigation itself. It includes also imposition of finality on the dispute that gave rise to the litigation so far as it is within the means of legal process to do so. In a still broader sense, the law of res judicata judicata cumulatively reinforces the authoritativess of the law itself. It holds that at some point arguable questions of right and wrong for practical purposes simply cannot be argued any more." (Chapter 1, p.11.)

(7) "The central problem in finality of judgments is how far the principle of finality is to be qualified. The law of res judicata grapples with this central problem. Its specifications endeavor to state the conditions under which the possibility of failure of civil justice is so substantial as to justify remedial action in the form of relitigation. One the one hand, judgments must in general be accorded finality despite flaws in the processes leading to decision and the unavoidable possibility that the results in some instances were wrong. On the other hand, a judgment in a particular case must be subject to reexamination in the name of substantial justice if the initial engagement of the merits was inadequate. Mediation between these opposed considerations cannot be simply ad hoc; if it were, both the finality of judgments and the opportunity for reexamination would be a function of in the institutions of judges. A measure of intuition and discretion, to be sure, is required in administering the law of res judicata, as the rules in this Restatement frankly acknowledge. However, a policy of reasonable finality requires rules that take into account the complex substantive and procedural considerations going into a civil judgment. The laws of res judicata is thus a mirror of legal justice itself." (Chapter 1, p.12.)

4. [sec. 285] distinction: Direct Estoppel.

"Issue preclusion" generally occurs where an issue previously litigated and determined is raised in a subsequent action between the same parties *on a different claim*. This effect is commonly called *collateral estoppel*. (See supra, Sec. 281 and infra, Sec. 354.)

In some situations, however, the issue previously litigated and determined is raised again in a subsequent proper action between the same parties *on the same claim*. The Restatement characterizes this effect as *direct* estoppel. (See Rest.2d Judgments, Int.Note, p. 131; Sec. 17, Comment c; sec. 20, Comment b; *MIB v. Superior Court* (1980) 106 C.A.3d 228, 232, 164 C.R. 828; *Smith v. Smith* (1981) 127 C.A. 3d 203, 207, 208, 179 C.R. 492 [quoting and discussing Second Restatement Tentative Draft].)

Thus, if the defendant successfully raises the objections of lack of jurisdiction, improper venue, or nonjoinder of parties, a resulting judgment of dismissal is not on the merits and is therefore neither a merger nor a bar. Hence, the plaintiff may bring a second action on the same claim. (Rest.2d, Judgments Sec. 20(1).) But the issue determined in the first action –lack of jurisdiction, improper venue, or nonjoinder of parties–is conclusive on the parties in that second action. (Rest.2d, Judgments, Sec. 17, Comment c; Sec. 20, Comment b.) *King v. International Union of Operating Engineers* (1952) 114 C.A.2d 159, 164, 250 P.2d 11, illustrates the concept, although it does not utilize the Restatement's terminology. The first suit was by a number of members of a local union on behalf of all to obtain a declaration of local freedom from control by the international union. It was dismissed without prejudice for failure to exhaust inter-union remedies. *Held,* the judgment of dismissal was res judicata in this second suit by other union members seeking the same relief without exhaustion of those remedies.

MIB v. Superior Court, supra, citing the first Restatement, California cases and the text, applied the doctrine to a determination of *nonjurisdiction*. In three prior actions against MIB, a foreign corporation, the trial court quashed summons on the ground that plaintiff had failed to show sufficient contacts with this state to subject MIB to the jurisdiction of California courts. *Held,* this prior determination of the jurisdictional issue was res judicata; i.e., a determination of jurisdictional facts is binding, whether it establishes jurisdiction or lack of jurisdiction. (106 C.A.3d 232, 234) (For a full discussion of the res judicata effect of jurisdictional determinations, see 2 *Cal.Proc.* (4th), *Jurisdictional,* sec. 335 et seq.)

In *Smith v. Smith,* supra, plaintiff wife sued defendant husband for divorce in 1967, but did not plead his military retirement benefits as community property. They were therefore not considered and the decree divided only the listed items. In 1968, plaintiff moved to amend the divorce judgment on the ground of mistake, etc., of her former attorney (L) and, on denial of the motion for untimeliness, brought an action against defendant seeking either to set aside the decree or an award of one-half of the

etirement benefits. Defendant demurred on the grounds that (a) L's mistake was ntrinsic and not a basis for equitable relief; and (b) the divorce decree was res udicata on community property rights. The demurrer was sustained and the action was dismissed. Plaintiff then sued her former attorney for malpractice and obtained a judgment for $100,000–the value of her lost claim of community property benefits (*Smith v. Smith* (1975) 13 C.3d 349, 118 C.R. 621, 530 P.2d 589, 1 *Cal.Proc.* (4th), *Attorneys*, Sec.344). In 1978, Plaintiff brought the present action to recover the same lost benefits. The trial judge concluded that the current complaint was identical to one cause of action of the 1968 complaint and that the judgment on demurrer in the 1968 action was res judicata. *Held,* affirmed.

(a) If the 1968 judgment had been limited to the impropriety of the remedy of equitable relief against a judgment, it would not be a . . .to a subsequent action seeking an appropriate remedy. (127 C.A.3d 207, citing the text.) But the judgment also resolved the issue of res judicata tendered by the demurrer, i.e., it determined that failure to tender the issue of retirement benefits in the divorce action barred a later claim for those benefits (127 C.A.3d 207.)

(b) Plaintiff's contention that the 1968 judgment was no res judicata because it did not correctly decide the merits of her community property claim is unsound: a judgment not passing directly on the *substance of a claim* may nevertheless operate as a bar to relitigation of *the very issue* that was litigated in the previous action. (127 C.A.3d 207, 208.) The 1968 judgment determined the issue of the res judicata effect of the divorce decree on the claim of retirement benefits, and thus operated as a direct estoppel. (127 C.A. 3d 209.)

5. [Sec. 286] Where Doctrine Is Inapplicable.

[a] *Direct Attack on Judgment Not Final.* By its very nature, the doctrine does not prevent timely direct attack, e.g., by motion for new trial or appeal. It only applies where the judgment is final and safe from direct attack, and is *collaterally attacked* in a subsequent proceeding. (See Rest.2d, Judgments Sec. 13, Comment a; Sec.17, Comment d; infra, Sec. 306 et seq.)

[b] *Judgment Not on Merits.* The doctrine only protects a final determination of the controversy on the merits of the claims and defenses. If the judgment is on procedural or other grounds unrelated to the merits, it is not res judicata. (See infra, Sec. 313 et seq.)

[c] *Judgment Void.* Obviously a judgment, though final and on the merits, has no binding force and is subject to collateral attack if it is wholly void for lack of jurisdiction of the subject matter or person, an perhaps for excess of jurisdiction, or where it is obtained by extrinsic fraud. (See Rest.2d, Judgments Sections 12, 17; 2 *Cal. Proc.* (4th), *Jurisdiction,* Sections 10, 108, 323; 8 *Cal.Proc.* (4th), *Attack on Judgment in Trial Court,* Sections 6 et seq., 223 et seq.)

[d] *Parties Not Adversaries.* *In Atherley v. MacDonald, young & Nelson* (1955) 135 C.A.2d 383, 287, P.2d 529, plaintiff sued M and F for personal injuries. Defendant M cross-complained against defendant F on an agreement to hold M harmless from liability. The trial judge struck out the cross-complaint and M appealed. Pending the appeal, the main action was tried with judgment for plaintiff against M and absolving F. *Held,* M's appeal was not rendered moot. "[I]n no event is a judgment in an action in which the parties were not adversaries, but only joined as codefendats, res judicata as between them in a later proceeding. . . .If respond [F] had permitted appellants' cross-complaint to go to trial then, of course, the parties would have occupied the adversary position necessary to make the judgment res judicata between them." (135 C.A.2d 385.) (See *Truck Ins. Exchange v. Torres Installers* (1972) 25 C.A.3d 491, 495, 101 C.R. 919; *Schultz v. Harney* (1994) 27 C.A.4th 1611, 1620, 33 C.r.2d 276 [citing *Estate of Charters,* infra, this section; res judicata did not bar action by guardians ad litem for minor to recover excessive attorneys' fees awarded by probate court in minor's prior medical malpractice action; attorney and guardians were not adversaries in medical malpractice action]; Rest.2d, Judgments Sec. 38, Comment b.)

[c] *No Adversary Trial of Issue.* In *Estate of Charters* (1956) 46 C.2d 227, 293 P.2d 778, S became guardian of the estate of a minor and also trustee of a testamentary trust for her. S, in violation of the trust terms, sold her residence, and had the account approved. In this proceeding for instructions, the court ordered the trustee to purchase a suitable home for her or provide her with rent. *Held,* affirmed; the order settling the account was not res judicata. The trustee occupied a dual relationship, the minor had no independent representation and no opportunity to present her claims to the court, and there was therefore no adversary trial or decision of the issue. (46 C.2d 234.)

6. Discretionary Rejection of Doctrine.

(a) **[Sec.287] Grenfield Case and Criticisms.**

Greenfield v. Mather (1948) 32 C.2d 23, 194 P.2d interpleader suit, was the culmination of a series of appellate proceedings over the division of a $12,549.60 fund between a divorced husband wife. On the fourth appeal in the action between spouses, the Supreme Court finally decided the issue with reversal with directions to enter judgment that the sum be paid: one-half to the husband and one-half to the wife. (25 C.2d 5 ...) Trial judge entered the judgment, and it was accepted as res judicata by the judge in the interpleader suit in which the fund was divided. The wife appealed, offering figures in support of herself to the whole of the fund. In this appeal, the majority declare that the Supreme Court, in its previous decisions Such a settlement and dismissal of the lawsuit can fairly be construed as a judgment favoring plaintiff on the merits." (140 C.A.3d 939.)

(3) "Under no stretch of the imagination can the payment of $218,837 on the

$262,600 judgment (83 percent of the judgment) be considered a judgment on the merits for Deere; rather, it reflects a considered decision by Deere that pursuing the appeal to its conclusion would result in Deere paying the full judgment plus interest. Deere's facade of continued nonliability by use of stereotyped language in the settlement agreement does not alter the fact that the plaintiff prevailed in the lawsuit because of the jury's finding of a product defect." It is the nature of the action and the character of the judgment, not recitals in the judgment, that determine whether it is res judicata. (140 C.A. 3d, 940, citing *Goddard v. Security Title Ins. & Guarantee Co.* (1939) 14 C.2d 47, 52, 92 P.2d 804, infra, Sec. 318.) See *Producers Dairy Delivery Co. V. Sentry Ins. Co.* (1986) 41C3d 903, 911, 226 C.R. 558, 718 P.2d 920 [following *Sandoval;* settlement after affirmance on appeal and before expiration of time to petition for review was final judgment for collateral estoppel purposes]; *McClain v. Rush* (1989) 216 C.A.3d 18, 25, 264 C.R. 563 [following *Sandoval;* summary judgment on issue]; *Long Beach Unified School Dist. V. California* (1990) 225 C.A. 3d 155, 169, 275 C.R. 449, supra, Sec. 307; *Abelson v. National Union Fire Ins. Co.* (1994) 28 C.A.4th 776, 787, 35 C.R. 2d 13 [judgment in coordinated litigation not final where 'limited purpose" collateral estoppel was given for test case while test case was on appeal].)

2. **Judgment on Merits.**

(a) **[Sec. 313] In General.**

A final judgment is res judicata only if it was rendered on the merits. This requirement is derived from the fundamental policy of the doctrine, which gives stability to judgments after the parties have a fair opportunity to litigate their claims and defenses. (See *Goddard v. Security title Ins. & Guarantee Co.* (1939) 14 C.2d 47, 51, 92, P.2d 804; *Datta v. Staab* (1959) 173 C.A.2d 613, 620, 343, P 2d 977, quoting the text: Rest. 2d Judgments Sec. 605; 65 Harv. L. Rev. 835; supra, Sec. 280.) (On conclusive effect of determination of an *issue* where the judgment is not on the merits (direct estoppel), see supra, Sec. 285)

The judgment is on the merits if the substance of the claim is tried and determined, no matter how wrongly it is decided. In other words, a judgment is binding and conclusive against collateral attack though it is harsh or unjust, contrary to the evidence, or based on errors of law. (See *Beverly Hills Nat. Bank v. Glynn* (1971) 16 C.A. 3d 274, 286, 93 C.R. 907, quoting the text; *Smith v. Smith* (1981) 127 C.A.3d 203, 209, 179 C.R. 492, quoting the text [postdivorce ruling that decree was res judicata on status of retirement benefits as community property barred further attempt to recover benefits]; 46 am.Jur.2d (Rev.ed.), Judgment Sec. 606; 2 *Cal.Proc.* (4th), *Jurisdiction,* Section 278; but see supra, Sec. 287.)

The rule, however, does not produce a fixed classification of judgments that are or are not on the merits, it is often necessary to examine the record of the proceedings

to determine whether a particular adjudication is to be considered res judicata. (See supra, Sec. 292 infra, Sec. 314 et seq.)

(b) What Judgments Are on Merits.

(1) [Sec. 314] Judgement After Trial on Facts.

The usual judgment that meets all the tests and carries out the policies of the doctrine is one rendered after a trial of he issues of fact, by the jury or court. It is on the merits though rendered on a directed verdict, or as a judgment notwithstanding the verdict. (See Rest. 2d, Judgments Sec. 19, Comment h; 65 Har. L.rev. 836; 7 *Cal.Proc.* (4th), *Trial,* Sections 430,446.)

(2) [Sec.315] Judgement Without Trial on Facts.

(a) *Summary Judgment.* A judgment entered after granting a motion for summary judgment is as final and conclusive a determination of the merits as a judgment after trial. (See C.C.P. 437c; *State Farm Mut. Auto. Ins. Co. V. Salazar* (1957) 155 C.A.2d Supp. 861, 864, 318 P.2d 210, citing the text; *Martens v. Winder* (1961) 191 C.A.2d 143, 151, 12 C.R. 413 [dictum]; *Columbus Line v.Gray Line Sight-Seeing Cos. Associated* (1981) 120 C.A.3d 622, 629, 174 C.R. 527, citing the text; *Castro v. Higaki* (1994) 31 C.A.4th 350, 357, 358, 37 C.R. 2d 84 [denial of petition under C.C. 1714.10 (leave to file civil conspiracy action against attorney is judgment on the merits, analogous to granting of motion for summary judgment]; but cf. *Koch v. Rodlin Enterprises* (1990) 223 C.A.3d 1591, 1595, 1597, 273 C.R. 438 [summary judgment in previous action on ground that statute of limitations had run was not judgment on merits]; 6 *Cal. Proc.* (4th), *Proceedings Without Trial,* Sec. 227.)

JAMES MARTIN, Petitioner v. THE SUPERIOR COURT OF SACRAMENTO COUNTY et al., Respondents.

[Crim. No. 2683. In Bank.–June 28, 1924.]

In the Matter of the Application of FRED W. CHAPMAN for a Writ of Habeas Corpus.

[S.F. No. 11139. In Bank.–June 28, 1924]

GEORGE ANASTASION, Petitioner, v. THE SUPERIOR COURT OF SACRAMENTO COUNTY et al., Respondents.

[1] CONSTITUTIONAL LAW - CLASSIFICATION OF PERSONS OR THINGS- BASIS OF DISTINCTION.–Where a classification of persons or things is distinctive and such distinction is based upon some "constitutional, or naturel, or intrinsic distinction," laws may e made applicable to such class alone, providing the act is uniform as to all persons or things within such class.

[2] JURIES AND JURORS–SELECTION OF JURORS–SECTION 204,

CODE OF CIVIL PROCEDURE, AS AMENDED IN 1923-CONSTITUTIONAL LAW. That portion of section 204 of the Code of civil Procedure as amended in 1923 (stats. 1923, c.195,p.436), relating to the selection of jurors, which provides that, "In counties and cities and counties having a population of ninethy thousand inhabitants or over, such selection shall be made by a majority of the judges of he superior court," is not a special law; it is a general law having a uniform operation upon a class of persons or things readily and naturally differentiated form another class of persons or things by reason of the necessities peculiar to the subject matter of the legislation.

[3] CONSTITUTIONAL LAW-SPECIAL LAWS-CLASSIFICATION BY LEGISLATURE.-A law is not special legislation merely because it does not apply to all persons; the legislature may classify for the purpose of meeting different conditions, naturally requiring different legislation, in order that legislation may by adapted to the needs of the people. If the law is to bear equally upon all persons, the legislature must classify whenever there exists a reason which may rationally be held to justify a diversity of legislation; in other words, different persons, different localities, and different governmental organization and agencies may justly be found by the legislature to stand in different relations to the law, and if the same law were, in such a situation, to be applied to all alike, it would not bear equally upon each of them.

[4] I.D-CHARACTER OF CLASSIFICATION.–The classification by the legislature must not be arbitrarily made for the mere purpose of classification, but must be based upon some distinction, natural, intrinsic, or constitutional, which suggests a reason for and justifies the particular legislation; that is to say, not only must the class itself be germane to the purpose of the law but the individual components of the class must be characterized by some substantial qualities or attributes which suggest the need for and the propriety of the legislation. Subject to these limitations a law is general despite the fact that it operates only upon a class of individuals or things, if it applies equally to all persons or things within the class to which it is addressed.

[5] ID.-FACTS JUSTIFYING CLASSIFICATION-LEGISLATURE-PRESUMPTIONS-COURTS.-The authority and the duty to ascertain the facts which will justify classified legislation must of necessity rest

with the legislature, in the first instance, to whom has been given the power to legislate and not to the courts and the decision of the legislature in that behalf is ordinarily conclusive upon the courts. Every presumption is in favor of the validity of the legislative act and the legislative classification will not therefore be disturbed unless it is palpably arbitrary in its nature and neither founded upon nor supported by reason.

[6] ID-CLASSIFICATION-JUDICIAL NOTICE-COURTS.-In any given case if the existence of a state of facts of which the court may take judicial notice seems to have been made the basis of a particular piece of legislation and if it may be reasonably said that such facts afford good ground for the making of a particular classification, the legislative enactment will be upheld although the reason therefor does not appear *prima facie* in the law itself.

[7] JURIES AND JURORS-CLASSIFICATION MADE BY SECTION 204, CODE OF CIVIL PROCEDURE-BASIS FOR-CONSTITUTIONAL LAW.-It cannot be said that the classification made by the legislature in providing by the 1923 amendment to section 204 of the Code of Civil Procedure that in counties and cities and counties having a population of ninety thousand inhabitants or over the selection of jurors shall be made by a majority of the judges of the superior court, is palpably arbitrary and was made merely for the purpose of a classification which bears no relation to the inherent purpose of the law, the amendment in question doubtless having been enacted in order to facilitate and expedite the work of the superior courts in the more populous counties of the state.

[8] ID.-CLASSIFIED LEGISLATION-JUDICIAL NOTICE.-In determining the need and propriety of classified legislation, where the same does not appear upon the face of the legislative enactment, the court may resort to its judicial knowledge of the contemporaneous conditions and situation of the people, the existing economic, sociologic, and civic policy of the state and all other matters of common knowledge.

[9] ID.-SELECTION OF JURORS-JUDICIAL NOTICE.-It is a matter of common knowledge, to be noticed judicially, that there are several counties of the state each possessing a population many times greater than the population of each of the remaining counties of the state; that the counties with the greater populations have vastly more court business and consequently require many more trial jurors than the less populous counties; that the boards of supervisors of the counties

of the greater population have a larger, more continuous and complicated volume of official business to deal with and dispose of than do the boards of supervisors of the many less populous counties; that the boards of supervisors of the more populous counties are personally acquainted with only a comparatively small percentage of their constituents and, therefore, less qualified to determine who, among their constituents, possess the degree of moral and intellectual fitness requisite for jurors, than are the boards of supervisors of the less populous counties who are ordinarily in closer communication with their constituents; that the judges of the superior courts, coming as they do constantly in contact with the personnel of trial jurors, are, by reason of their observation and experience, well qualified to perform the duties of selecting and listing persons to serve as trial jurors; and that in a situation where the persons to be selected as trial jurors in the more populous counties are not personally known to the boards of supervisors, the judges of the superior court, doubtless, are better qualified to make the required selection than the boards of supervisors who, because of their multitudinous duties incidental to the government of such counties, cannot be expected to give the time and though requisite to the selection of trial jurors.

[10] ID.-REDUCTION OF NUMERICAL BASIS OF CLASSIFICATION-POWER OF LEGISLATURE.-The power of determining the numerical basis of the classification of counties in the matter of selection of jurors rested with the legislature and having the power to fix the limit of population at one hundred thousand to which, in the fist instance, the legislation applied, the legislature had the power to reasonably reduce the numerical limits of population where ever, in the exercise of a wise discretion, the exigencies of a given situation so required; in other words, "where the discretion so to classify is vested in the legislature, the selection of a limit is a legislative power which will be judicially reviewed only in the plain case of abuse."

[11] ID.-JURY COMMISSIONER-PUBLIC OFFICERS-CONSTITUTIONAL LAW.-the provision of section 204 of the Code of Civil Procedure which provides for and permits the appointment of a jury commissioner, in certain designated counties, to assist the judges of the superior courts of those counties in making selections of trial and grand jurors does not create a state or county office, and the jury commissioner, when appointed, like other attaches of the judicial system of the state, is no more than an adjunct of that system acting

in the capacity of a mere employee to enable the court to transact its judicial work in an orderly and expeditious manner and is an adjunct "which the legislature . . .has the right to provide for when it deems necessary."

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(1) 12 C.J., pp. 1129, 134, secs. 55, 858; 30 Cyc., pp. 992, 993. 92) 36 Cyc., p. 987. (3) 12 C.J., p. 1129, sec. 855; 36 Cyc., p. 986. (4) 12 C.J., p. 1130, sec. 855; 36 Cyc., p. 985. (5) 12 C.J., pp. 794, 891, 1129, 1130, secs. 222, 390, 855. (6) 12 C.J., pp. 787, 1129, secs. 219, 855 (1926 Anno.). (7) 12 C.J., p. 1134, sec. 858. (8) 12 C.J., p. 787, sec. 219 (1926 Anno.). (9) 23 C.J., pp. 59, 161, secs, 1810, 1987. (10) 12 C.J., p. 1130, sec. 855. (11) 35 C.J., pp. 258, 259, sec. 205 (1926 Anno.).

PROCEEDINGS in Prohibition to restrain the Superior Court of Sacramento County from proceeding to a trial of certain actions; and proceeding in *habeas corpus* to secure release from judgment of contempt of court. Writs of prohibition denied; writ of *habeas corpus* denied.

The facts are stated in the opinion of the court.

S. Luke Howe, R.B. Hibbitt, Markham Johnston, O.F. Meldon and T.A.Farrell for Petitioner in S.F. No. 11128.

Edward T. Bishop, County Counsel, Roy W. Dowds, Deputy County Counsel, R. Platnauer and Wm. H. Devlin, *Amici Curiae*.

Thomas B. Leeper for petitioner in Crim. No. 2683.

J.T. Henderson district Attorney, and Wm. V. Cowan, Assistant District Attorney, for Respondents in Crim. No. 2683.

Wm. H. Devlin, Edward T. Bishop, County Counsel, and Roy W. Dowds, Deputy County Counsel, *amici Curiae* in support of petition in Crim. No. 2683.

T.A. Farrell for petitioner in S.F. No. 11139.

Edward T. Bishop, County Counsel, Roy w. Dowds, Deputy County Counsel and Wm. H. Devlin, *amici Curiae* in S.F. No. 11139.

LENNON, J.–The three above-entitled cases, although differing in the facts which form the basis of the respective petitions, present precisely the same legal questions for decision. Each petition attacks the legality of the procedure provided for the selection and listing of trial jurors in certain counties of the state of which the county of Sacramento is one.

In the matter of the application of Fred w. Chapman, the petitioner seeks his release upon *habeas corpus* from a judgment adjudging him guilty of contempt of court in refusing to answer a summons to appear and serve as a trial juror and in refusing to act as a trial juror in the superior court of the county of Sacramento. The petitioner, Chapman, was summoned pursuant to the procedure provided by section 204 et seq. of the Code of Civil Procedure. The petitioners in the Anastasion case and the

Martin case seek writs of prohibition to have the superior court in and for the county of Sacramento restrained from proceeding to a trial of the causes, in which they are respectively defendants, with a jury composed of persons selected to serve as trial jurors in said court for the year 1924.

In the Anastasion case the petitioner was charged with unlawfully having in his possession intoxicating liquor in violation of the Wright Act 9Stats. 1921, p. 79) with two prior convictions. Thereafter he was arraigned and pleaded not guilty and his case was set for trial for the thirtieth day of April, 1924. The manner and method of listing and selecting the persons to serve as trial jurors in the same superior court and from whom the jurors were to be drawn for the trial of the two last-mentioned cases followed the provisions of the code sections last above referred to.

A discussion and a decision of the facts and the law as applied to the martin case will suffice as a basis for the decision in the other two cases.

The petition for a writ of prohibition in the Martin case is predicated upon the following facts: the petitioner was on the twenty-seventh day of November, 1923, indicted by the grand jury of the county of Sacramento for the crime of murder. Thereafter, the petitioner was duly arraigned upon said charge and thereupon pleaded not guilty. Subsequently the cause was set down for trial upon a designated day. Thereafter, at a time some several weeks in advance of the date set for the trial of the cause a majority of the judges of said superior court made and entered a court order directed to one Matt P. Barnes , as "Jury Commissioner of Sacramento County," to return to said court within a specified time a list of one hundred qualified persons to act as trial jurors in civil and criminal causes during the ensuing year. Thereafter, pursuant to said order, the said Barnes, as jury commissioner, returned to said court a list of persons qualified to act as jurors. Whereupon, the said judges selected each and all of said persons to serve as trial jurors in said court for the ensuing year of 1924. Subsequently the judge of department one of said court, wherein the charge of murder was and is pending against the petitioner, made and entered an order directing the clerk of said court to draw from the regular trial jury-box of said county, in which were the names, and only the names, of persons returned and selected in the first instance as aforesaid, the names of seventy-five persons from which would be drawn the names of the persons to serve as trial jurors during the April session of said superior court. Upon said drawing being made the court directed to be issued and placed and there was issued and placed in the hands of the sheriff of the county a venire for the summoning of said persons returnable April 14,1924. Thereafter, the said sheriff returned said venire to said court, together with his return thereon, specifying the names of said jurors so summoned.

Prior to the filing herein of the Martin petition, the said superior court, over the objection of the petitioner, declared its intention and purpose to proceed with the trial

of the case of the said petitioner, now pending in said court, with the persons so as aforesaid selected to serve as trial jurors in said court.

In support of the petition for the writ of prohibition, it is contended that the portion of section 204 of the Code of Civil Procedure as amended in 1923 (Stats. 1923, c. 195, p. 436) relating to the selection of jurors, which provides, that "In counties and cities and counties having a population of ninety thousand inhabitants or over, such selection shall be made by a majority of the judges of the superior court . . .," is unconstitutional and void in that it violates those provisions of the state constitution which provide that,

(1) "all laws of a general nature shall have a uniform operation." (Art. I, sec. 11.)

(2) "No special privileges or immunities shall ever be granted which may not be altered, revoked, or repealed by the legislature, nor shall any citizen, or class of citizens, be granted privileges or immunities which, upon the same terms, shall not be granted to all citizens." (Art. I., Sec. 21.)

(3) "The legislature shall not pass local or special laws in any of the following enumerated cases, that is to say; . . .Regulating the practice of courts of justice. . . .Summoning and impaneling grand and petit juries, and providing for their compensation. . . ." (Art. IV, sec. 25, subds. 3 and 8.)

While the petitioner refers to and relies upon all of the sections of the constitution above quoted, nevertheless the sum and substance of the argument made in support of the petition is condensed into the one proposition, that the law in question is special legislation in that it does not uniformly apply to and operate upon all persons and things throughout the state.

Section 204 of the Code of Civil Procedure as it existed prior to 1923 provided in substance and effect that the superior court of each county, in the month of January of each year, should designate the estimated number of grand and trial jurors required for the transaction of the business of the court and the trial of causes therein during the ensuing year; that the court should select and list the grand jurors, and that immediately after the making of the order designating the estimated number of trial jurors, "the board of supervisors shall select . . .a list of men and women to serve as trial jurors . . .during the ensuing year, . . . " It will be noted that the selection in question that, "In counties and cities and counties having a population of one hundred thousand inhabitants or over, such selection shall be made by a majority of the judges of the superior court."

By the amendment in question, as enacted in 1923, the basis of classification for the purpose of selecting and returning jurors for courts of record was changed from counties and cities and counties having a population of one hundred thousand inhabitants or over to counties and cities and counties having a population of ninety thousand inhabitants or over.

[1] It is conceded, as indeed it must be, that where a classification of persons or things is distinctive and such distinction is based upon some "constitutional, or natural, or intrinsic distinction," laws may be made applicable to such class alone, providing the act is uniform as to all persons or things within such class. But it is argued in the instant case that there is no "constitutional, or natural or intrinsic distinction" inherent in the procedure and practice requisite for the selection and listing of trial jurors in counties having a population of ninety thousand or over and the procedure and practice required for the same purpose in the remaining counties of the state having smaller populations.

[2] the amendment under consideration is not, in our opinion, a special law. It is a general law having a uniform operation upon a class of persons or things readily and naturally differentiated form another class of persons or things by reason of the necessities peculiar to the subject matter of the legislation. [3] A law is not special legislation merely because it does not apply to all persons. It is a settled principle of constitutional law that the legislature may classify for the purpose of meeting different conditions, naturally requiring different legislation, in order that legislation may be adapted to the needs of the people. If the law is to bear equally upon all persons, the legislature must classify whenever there exists a reason which may rationally be held to justify a diversity of legislation. In other words, different persons, different localities, and different governmental organizations and agencies may justly be found by legislature to stand in different relations to the law and if the same law were, in such a situation, to be applied to all alike, it would not bear equally upon each of them. (*Darcy v. Mayor etc. of San Jose,* 104 Cal. 642 [38 Pac. 500]; *In re Sumida,* 177 Cal. 388 [170 Pac. 823].

[4] the classification, however, must not be arbitrarily made for the mere purpose of classification, but must be based upon some distinction, natural, intrinsic, or constitutional, which suggests a reason for and justifies the particular legislation. That is to say, not only must the class itself be germane to the purpose of the law but the individual components of the class must be characterized by some substantial qualities or attributes which suggest the need for and the propriety of the legislation. Subject to these limitations a law is general despite the fact that it operates only upon a class of individuals or things, if it applies equally to all persons or things within the class to which it is addressed. (*Pasadena v. Stimson,* 91 Cal. 238 [27 Pac. 604]; *McDonald v. Conniff,* 99 Cal. 386 [34 Pac. 71]; *Darcy v. Mayor etc. of San Jose, supra; People v. Central pac. R.R. Co.,* 105 Cal. 576 [38 Pac. 905]; *Deyoe v. Superior Court* 140 Cal. 476 [98 am. St. Rep. 73, 74 Pac. 28]; *ruperich v. Baehr,* 142 Cal. 190 [75 Pac. 782]; *Title etc. Restoration Co. v. Kerrigan,* 150 Cal. 289 [119 Am. St. rep. 199, 8 L.R.A. 682, 88 Pac. 356]; *Ex parte King,* 157 Cal. 51[26 L.r.A. (N.S.) 242, 106 Pac. 235]; *Matter of Application of Miller,* 162 Cal. 687 [124 Pac. 429]; *Gridley v.*

Fellows, 166 Cal. 765 [138 Pac. 355]; *In re Sumida, supra; In re Morganstern,* 61 Ca App. 702 [215 Pac. 721].

The power to thus classify necessarily carries with it a wide discretion in th exercise thereof. [5] the authority and the duty to ascertain the facts which will justi classified legislation must of necessity rest with the legislature, in the first instance, t whom has been given the power to legislate and not to the courts and the decisio of the legislature in that behalf is ordinarily conclusive upon the courts. Ever presumption is in favor of the validity of the legislative act and the legislativ classification will not therefore be disturbed unless it is palpably arbitrary in its natur and neither founded upon nor supported by reason. (*In the Matter of a Proceedin to validate the Sutter-Butte By-Pass Assessment No. 6 of the Sacramento and San Joaquin Drainage District,* 191 Cal. 650 [218 Pac. 27]. [6] It follows that in any given case if the existence of a state of facts of which the court may take judicial notice seems to have been made the basis of a particular piece of legislation and if it may be reasonably said that such facts afford good ground for the making of a particular classification the legislative enactment will be upheld although the reason therefor does not appear *prima facie* in the law itself (*Stevenson v. Colgan,* 91 Cal. 649 [2 Am. St. Rep. 230, 14 L.r.A. 459, 27 Pac. 1089]; *Grumbach v. Lelande,* 154 Cal. 67 [98 Pac. 1059]; *People v. Sacramento Drainage Dist.* 155 Cal. 373 [103 Pac. 207] *Matter of Application of Martin, supra, Ex parte King, supra; Matter of Petition of Burke,* 160 Cal. 300 [116 Pac. 755]; *In re sumida, supra; Bacon v. Walker,* 204 U.S. 311 [51 L. Ed. 499, 27 Sup. Ct. Rep. 289, see, also, Rose's U.S. Notes].)

[7] It cannot be said that the classification made by the legislature in the instant case is palpably arbitrary and was made merely for the purpose of a classification which bears no relation to the inherent purpose of the law. To the contrary, we are of the opinion that good and sufficient reason existed for the classification. The amendment in question doubtless was enacted in order to facilitate and expedite the work of the superior courts in the more populous counties of the state. Manifestly, the plan of having trial jurors in such counties selected by a majority of the judges of the superior courts rather than by the board of supervisors of the county tends to promote the efficiency and expedition of the business of the courts.

[8] In determining the need and propriety of classified legislation, where the same does not appear upon the face of the legislative enactment, the court may resort to its judaical knowledge of the contemporaneous conditions and situation of the people, the existing economic, sociologic, and civic policy of the state and all other matters of common knowledge. [9] It is a matter of common knowledge, to be noticed judicially, that there are several counties of the state each possessing a population many times greater than the population of each of the remaining counties of the state; that the counties with the greater populations have vastly more court business and

consequently require many more trial jurors than the less populous counties; that the boards of supervisors of the counties of the greater population have a larger, more continuous and complicated volume of official business to deal with and dispose of than do the boards of supervisors of the many less populous counties; that the boards of supervisors of the more populous counties are personally acquainted with only a comparatively small percentage of their constituents and, therefore, less qualified to determine who, among their constituents, possess the degree of moral and intellectual fitness requisite for jurors, than are the boards of supervisors of the less populous counties who are ordinarily in closer communication with their constituents; that the judges of the superior courts, coming as they do constantly in contact with the personnel of trial jurors, are, buy reason of their observation and experience, well qualified to perform the duties of selecting and listing persons to serve as trial jurors; and that in a situation where the persons to be selected as trial jurors in the more populous counties are not personally known to the boards of supervisors, the judges of the superior court, doubtless, are better qualified to make the required selection than the boards of supervisors who, because of their multitudinous duties incidental to the government of such counties cannot be expected to give the time and thought requisite to the selection of trial jurors. From the foregoing facts the conclusion is readily deducible and doubtless was deduced by the legislature when enacting the legislation in question, that in counties having a small population the boards of supervisors have both the requisite time and frequent opportunity for observation requisite to the selection of the limited number of trial jurors required to serve the needs of the courts in these counties, and that the boards of supervisor of the more populous counties have not the requisite opportunity because of their other multitudinous duties and lack of personal acquaintance to personally and properly select the large number of trial jurors required in the more populous counties, and for that reason it may be said that the distinction which the legislature drew between the known situation existing in counties having a population of ninety thousand and over and counties having a lesser population was a natural and intrinsic distinction which amply justified the legislation complained of. In short, there is good reason for the distinction made by the amendment and a most natural one. The classification being permissible it is not, and cannot be, denied that the law purports to, and undoubtedly does, in its operation and effect, apply equally and uniformly to all persons and things falling within the designated class.

The case of *In re Brady*, 65 Cal. App. 345 [224 Pac. 252], cited and relied upon in support of the contention that the legislature has no power to make the classification complained of in the instant case, is not in conflict with anything decided here. There the court had under consideration the question of whether or not an amendment to the Code of Civil Procedure (secs. 73 and 142, Stas. 1923, c. 42, p. 78), which

provided that one session of the superior court should be held in each city containi a population of not less than fifty thousand, *located in counties of the first cla* whose city hall was not less than fifteen miles distant from the site of the cou courthouse, was unconstitutional in that it was special legislation. The court the speaking through Mr. Justice Houser, recognized and reaffirmed the settled rule t a statute even though it does not purport to apply to all of the people of the state not special legislation and therefore unconstitutional if it applies to and affects individuals and things embraced within a proper classification, and then held that classification made by the legislature in that case was not a proper classification the reason that, having in mind the purpose of the statute, no constitutional, natu or intrinsic distinction existed between cities containing a population of not less th fifty thousand, located in counties of the first class, and cities containing a populati of not less than fifty thousand, located in counties not of the first class. We satisfied that the conclusion reached in the case last cited is correct and we are substantial accord with the reasoning upon which that conclusion is bas Obviously, the situation presented in the instance case is distinctly different form situation presented in the Brady case in this, that in the instant case, a natural intrinsic difference as a basis for the classification is readily discernible, whereas the Brady case no sufficient reason existed or could be conceived for the classificat there held to be unconstitutional.

The point is suggested rather than argued that the legislation in question is spec legislation in that the numerical basis of classification was reduced from one hund thousand to ninety thousand for the express purpose of admitting Sacramento Cou into the group of larger counties.

[10] It will suffice to say that it does not appear upon the face of the legislation t this was the purpose of the legislature and while it may, nevertheless, well be argu that that was the legislative purpose and intent, still the fact remains that the pow of determining the numerical basis of the classification rested with the legislature a having the power to fix the limit of population at one hundred thousand to which the first instance, the legislation applied, there can be no doubt it seems to us that legislature had the power to reasonably reduce the numerical limits of populat whenever, in the exercise of a wise discretion, the exigencies of a given situation required. In other words, "where the discretion so to classify is vested in legislature, the selection of a limit is a legislative power which will be judicia reviewed only in the plain case of abuse." (*Matter of the Petition of Burke, supr*

Incidental to the main point presented in support of the petition, it is argued t sections 204a to and including 204e of the Code of Civil Procedure are violative Article I, section 21, of the constitution, in that the appointment of a j commissioner and the listing of juries by him is made optional with the judges of

superior courts in the various counties wherein the provisions of these sections purport to have operation and effect. The constitutional provision last above referred to has to do and deals only with special privileges or immunities and we fail to perceive , and counsel for the petitioner has not pointed out, how or in what manner the appointment of a jury commissioner as a part of the judicial system of the state to serve certain designated courts can be construed and counted a special privilege or immunity within the meaning of those constitutional provisions. The most that we can make out of the contention of the petitioner in this particular is that the creation of the office of jury commissioner is tantamount to the creation of a county office, and being optional with the judges of the courts wherein such appointment may be made runs counter to he uniformity of the system of county government prevailing throughout the state. The case of *Coulter v. Pool,* 287 cal. 181 [201 Pac. 120], is cited in support of the contention thus apparently made. That case is readily distinguishable from and has no application to the situation here. There it was held in effect that a legislative enactment giving to boards of supervisors the power, at their option, to appoint a county engineer in the place and stead of the county surveyor permitted the creation of a county office contrary to the constitutional provisions (art. XI,sec. 4) which contemplate and command a uniform system of county government. 11] the provision of the statute under consideration in the instant case which provides for and permits the appointment of a jury commissioner, in certain designated counties, to assist the judges of the superior courts of those counties in making selections of trial and grand jurors does not create a state or county office, and he jury commissioner, when appointed, like other attaches of the judicial system of he state, is no more than an adjunct of that system acting in the capacity of a mere employee to enact the court to transact its judicial work in an orderly and expeditious manner and is an adjunct "which the legislature we do not doubt has the right to provide for when it deems necessary." (*Noel v. Lewis,* 35 Cal. App. 658, 662 [170 Pac. 857, 859].)

The writ of *habeas corpus* heretofore issued in the Chapman case is dismissed and he petitioner remanded to the custody from whence he came.

The order to show cause heretofore issued in the Anastasion case is dismissed and he petition for a peremptory writ of prohibition is denied.

The order to show cause heretofore issued in the martin case is dismissed and the petition for a peremptory writ of prohibition is denied.

Richards, J., Waste, J., Lawlor, J., Seawell, J., Shenk, J., and Myers, C.J., concurred.

[S.F. No. 11456. In Bank.–April 27, 1925.]

FRANCHISE MOTOR FREIGHT ASSOCIATION et al., Petitioners, v. CLYDE L. SEAVEY et al., as members of

the Railroad Commission of the State of California, Respondents.

[1] CONSTITUTIONAL LAW–CLASSIFIED LEGISLATION–POWER OF LEGISLATURE–PRESUMPTIONS. – The authority and duty to ascertain the facts which will justify classified legislation rests in the first instance with the legislature, and every presumption is in favor of the validity of the legislative determination, and its decision as to what is a sufficient distinction to warrant the classification will not be overthrown by the courts unless it is palpably arbitrary.

[2] ID.--UNLAWFUL DISCRIMINATION--PRIVILEGES--CLASS ARBITRARILY SELECTED.–A statute makes an improper and unlawful discrimination if it confers particular privileges upon a class arbitrarily selected from a larger number of persons all of whom stand in the same relation to the privilege granted and between whom and the persons not so favored no reasonable distinction or substantial difference can be found justifying the inclusion of the one and the exclusion of the other.

[3] ID.–REGULATION OF MOTOR-TRUCKS ON HIGHWAY-PURPOSE OF.–The primary purpose of the regulation of common carriers engaged in the business of hauling various kinds of freight by motor-truck upon the public highways is to insure the adequacy, regularity, and reliability of service and the reasonableness of rates and charges therefor, and such regulation is for the benefit of the producing and consuming public.

[4] ID.–AUTO STAGE AND TRANSPORTATION ACT–EXCLUSION OF CERTAIN COMPANIES–UNLAWFUL DISCRIMINATION. –The provision of chapter 310 of the Statutes of 1923, purporting to amend section 5 of the Auto Stage and Transportation Act of 1917, so as to exempt from regulations under the act transportation companies which are engaged exclusively in the movement of products or implements of husbandry and other farm necessities from farm to farm, or between farms and loading points, is an unwarranted discrimination and unconstitutional, as the classification provided in said act does not rest upon a constitutional distinction, nor is there any natural or intrinsic distinction as a basis for it.

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(1) 12 C.J., p. 887, n. 37, p. 891, n. 77, p. 894, n. 12, p. 1130, n. 25. (2) 12 C.J. p. 1130, n. 31; 36 Cyc., p. 992,n. 91. (3) 12 C.J., p. 1117, n. 53. (4) 12 C.J., p. 1117 n. 54; 36 Cyc., p. 994, n. 98.

APPLICATION for Writ of mandate to compel the Railroad Commission of California to exercise jurisdiction over certain transportation companies. Writ granted.

The facts are stated in the opinion of the court.

H.J. Bischoff for petitioners.

Carl I. Wheat and Woodward M. Taylor for Respondents.

MYERS, C.J.–this is an application for a writ of mandate to compel the respondent Commission to assume and exercise jurisdiction over certain persons engaged in the business of transportation of property as common carriers for compensation over the public highways in this state between fixed termini or over regular routes, and to require such persons to cease operating until they shall have applied for and obtained from the respondent Commission certificates of public convenience and necessity therefor. The truck operators referred to are engaged exclusively in the movement of products or implements of husbandry and other farm necessities from farm to farm or between farms and loading points. There is no dispute as to the facts herein and the matter is submitted upon a general demurrer to the petition. The refusal of the respondent Commission to assume and exercise jurisdiction herein is predicated upon chapter 310, Statutes of 1923, purporting to amend section 5 of the Auto Stage and Truck Transportation Act of 1917 so as to exclude such persons from the regulations of said act. Prior to 1917 the railroad Commission exercised no jurisdiction over transportation companies operating as common carriers of freight or passengers over the public highways by motor-stage or motor-truck. In December 1916, this court held that under section 22 of article XII of the constitution, as amended in 1911, the Railroad Commission was vested with the jurisdiction of the duty to regulate rates and charges of such carriers of freight and passengers by motor-truck; that this provision of the constitution could not be rendered nugatory by the omission of the legislature to prescribe procedural provisions for the carrying out thereof; and a peremptory writ of mandate was issued requiring the Railroad Commission to assume and exercise its jurisdiction over such carriers (*Western Association of Short Line Railroads v. Railroad Com.*, 173 Cal. 802 [1 A.L.R. 1455, 162 Pac. 391]). Thereupon the Auto Stage and Truck Transportation Act was enacted by the legislature to provide the procedural rules for the exercise of such jurisdiction. (Stats. 1917,p. 330.) The title of this act and certain sections thereof were amended in 1919 (Stats. 1919, p. 457). The term "transportation company," as used in the act, is defined in section 1 thereof to include "Every corporation or person . . .owning, controlling, operating or managing any automobile, jitney, bus, auto truck, stage or auto stage used in the business of transportation of persons or property, or as a common carrier, for compensation, over any public highway in this state between fixed termini or over a regular route, and not operating exclusively within the limits of an incorporated city or town or of a city and

county." (With certain exceptions not pertinent herein.) The validity of this definitio of the term "transportation company," as used in the constitution, is not challenge or questioned by either of the parties hereto. The truck operators who are referred t in the petition herein are transportation companies within the meaning of purview o this definition and it is not questioned that under the provisions of this act as it existe from 1917 to 1923 they were subject to all of the regulatory provisions thereof. I 1923 section 5 of the act, which provided for the issuance of certificates of publi convenience and necessity and forbade the operation by transportation companie upon the public highway without such certificates, was amended by adding there the following provisions: "Each application for a corticate of public convenience an necessity, . . .must be accompanied by a fee of fifty dollars; *provided, however,* th movement of products or implements of husbandry and other farm necessities fro farm to farm or from and to farm and from loading point, warehouse or other initi point shall not be subject to the regulations of this act." (Stats. 1923, p. 644.) Sinc the passage of this amendment the railroad Commission in obedience thereto h refrained from exercising jurisdiction over the transportation companies referred t therein and has declined to issue certificates of public convenience and necessity such transportation companies or to require them to apply for and obtain suc certificates (*In re Application of Geyer,* 23 Opinions and orders of Railroa Commission, p. 865). The interest of the petitioners in this proceeding consists in th fact that they are themselves engaged in the business of transportation of property a common carriers for compensation operating over the same routes which a followed by the truck operators referred to in the petition. Petitioners are operatin under certificates of public convenience and necessity obtained from the Railroa Commission, are subject to all of the regulations of the Commission, and by reaso of the failure of the Commission to act in the premises petitioners are subject to th unrestricted and unregulated competition of those other truck operators. Petitione contend that the amendment of 1923 is violative of sections 11 and 21 of article I the constitution of this state and of the fourteenth amendment to the federa constitution, in that it makes an arbitrary classification and distinction not based upo any natural, intrinsic, or constitutional ground of classification. In short, the contention is that the amendment which purports to exempt from the regulations the act those transportation companies which are engaged in hauling the product and implements of husbandry constitutes an unreasonable, unjust and unlawfu discrimination in favor of those transportation companies and against thes petitioners. The respondents concede that the jurisdiction and power which constitutionally vested in the Railroad Commission to regulate the rates of, to examin the books, records and papers of, and to hear and determine complaints against suc transportation companies cannot be taken away or abridged by the legislature. The

suggest, however, that the additional powers commonly exercised by the Commission, such as the power to issue certificates of public convenience and necessity, to regulate the accounts, service and safety of operations of transportation companies to fix their classifications, rules and regulations, to require them to file reports, to regulate the issue by them of stocks, bonds, etc., and the sale or transfer of certificates of convenience, etc., were conferred upon the Commission, not by the constitution, but by the legislature, and are therefore subject to withdrawal by the legislature which conferred them.

The question, therefore, is whether or not the exemption created by the proviso of 1923 constitutes a lawful classification. Concededly the classification here made does not rest upon a constitutional distinction, and some natural or intrinsic distinction must therefore by found as a basis for it. [1] It is well settled that the authority and duty to ascertain the facts which will justify classified legislation rests in the first instance with the legislature. Every presumption is in favor of the validity of the legislative determination, and its decision as to what is a sufficient distinction to warrant the classification will not be overthrown by the courts unless it is palpably arbitrary. (*Anastasion v. Superior Court,* 194 Cal. 93 [227 Pac. 762]; *People v. Monterey Fish Products Co.* 195 Cal. 548 [234 Pac. 398]). [2] It is equally well settled that a statute makes an improper and unlawful discrimination if it confers particular privileges upon a class arbitrarily selected from a larger number of persons all of whom stand in the same relation to the privileges granted and between whom and the persons not so favored no reasonable distinction or substantial difference can be found justifying the inclusion of the one and the exclusion of the other (5 Cal. Jur. 325, and cases cited). What reasonable ground of distinction is there between a common carrier engaged in the business of hauling various kinds of freight, including products and implements of husbandry, by motor-truck over a regular route upon the public highway and another common carrier engaged in the business of hauling freight which consists solely of the products and implements of husbandry by motor-truck over the same route, which justifies the subjection of the one to the regulations imposed by the Auto Stage and Truck Transportation Act, and the exemption of the other from the burden of those regulations? The only basis for such a distinction which has been suggested to us is that a continuance of the development of the state demands that the cultivation and marketing of farm products be encouraged and assisted and that the intent of the legislature in making this provision was the encouragement of the farmers to larger production and the assurance of accessibility of markets for that production, to the end that the products of the soil might be placed within the ready reach of all and their production fostered and assisted. This suggestion, as it seems to us, overlooks the main purpose of the regulation of rates and charges provided for in the constitution, and of the regulation of service,

competition, safety provisions, issuance of securities, etc., provided for in the act he in question. [3] It seems plain to us that the primary purpose of such regulation is insure the adequacy, regularity and reliability of service and the reasonableness rates and charges therefor. Such regulation is for the benefit of the producing a consuming public. It follows that the exemption from regulation of tho transportation companies engaged in hauling farm products and implements wou be a detriment, rather than a benefit, to the farmers, as well as to the public general and would be of benefit solely to the particular class of transportation companies exempted. [4] Assuming, however, that thee provision here in question was design for the benefit of the farmers and that it may conceivably so operate, the weight authority is to the effect that it is an unwarranted discrimination. A closely simi question came before the supreme court of the United States involving the invalid of the Illinois Anti-Trust Law of 1893 [Ill. Laws 1893, p. 182],which prohibited combination of capital, skill, or acts of two or more persons, etc., to create or ca out restrictions in trade, to limit production or increase or reduce prices or preve competition, and which contained a proviso that "The provisions of this act shall n apply to agricultural products or livestock while in the hands of the producer raiser." That court, after an exhaustive consideration of the case, held the statu invalid solely upon the ground that the exception in favor of the farms was unreasonable and unwarranted discrimination, violative of the fourteen amendment. In the course of its opinion the court observed, "that if combinations capital, skill or acts, in respect of the sale or purchase of goods, merchandise commodities, whereby such combinations may for their benefit exclusively cont or establish prices, are hurtful to the public interests and should be suppressed, it impossible to perceive why like combinations in respect of agricultural products a livestock are not also hurtful." (*Connolly v. Union Sewer Pipe Co.*, 184 U.S. 540 [L. Ed. 679, 22 Sup. Ct. Rep. 431, see, also Rose's U.S. Notes].) And so here it m be observed that if the regulation of transportation companies engaged in the busin of hauling miscellaneous freight and commodities is helpful to the public welfare is impossible to perceive why like regulation in respect of transportation compan engaged in hauling products and implements of husbandry is not also helpful. T precise question here under consideration came before the federal courts under t so-called Lever Food control Act which was enacted by Congress in 1917 (40 St 276), "to provide further for the national security and defense by encouraging t production, conserving the supply, and controlling the distribution of food produc and fuel." That act, which was enacted as a war measure, made unlawful t destruction, waste, or hoarding of necessaries for the purpose of restricting the supp or increasing the price thereof. By its terms it was made applicable to all persons, b subject to the following provisos: "Provided, that any storing or holding by a

rmer, gardener, or other person of the products of any farm, garden, or other land ultivated by him, shall not be deemed to be storing or holding within the meaning f this act: provided, further, that farmers and fruit growers, co-operative and other xchanges, or societies of a similar character, shall not be included within the rovisions of this section." In the district court for the district of Indiana, the ontention was made that the exemptions created by the provisos constituted an rbitrary and unlawful classification, violative of the due process clause of the fifth mendment, and that if enacted by a state legislature it would be equally violative of e like clause of the fourteenth amendment. In support of the act the contention was ade there, as here, that the exemption of the farmers was justified upon the ground at it would promote the general welfare by stimulating them to greater production. hat contention applied with much greater force to the situation then obtaining, with e nation involved in a great war, than it possibly could to the present situation. It as argued that Congress might well have determined that the safety of the nation epended upon the increased production and conservation of food supplies and that e national welfare would be promoted by exempting the farmers from the drastic rovisions of the act and thus stimulating them to increase their production. But the ourt held that the exemption was unreasonable, unjust and wholly arbitrary and ould not constitute a valid classification. Judge Anderson said: "the indulgence to e excepted class is in respect to the farm products produced or raised upon the land wned, leased, or cultivated by the members of it. But this does not differentiate the nstant case from the Connolly case (184 U.S. 540 [46 L. Ed. 679, 22 Sup. Ct. Rep. 31, see, also, Rose's U.S. Notes]), for there the exception was to apply to agricultural products or live stock while in the hands of the producer or raiser.' My onclusion is that the classification in amended section 4 is arbitrary and not natural r reasonable; that such section is repugnant to the `due process' clause of the Fifth mendment, and is therefore void." He also held that the words "due process of law" nust have the same meaning in the fifth and fourteenth amendments (*Hurtado v. California,* 110 U.S. 516 [28 L. Ed. 232, 4 Sup. Ct. Rep. 111, see, also, Rose's U.S. Notes]), from which it would follow that if the exception in the Lever Act is violative f the fifth amendment, the exemption in the Auto Stage and Truck Transportation Act would be equally violative of the fifth amendment, the exemption in the Auto Stage nd Truck Transportation Act would be equally violative of the fourteenth mendment (*United States v. Armstrong,* 265 Fed. 683). The same question came efore the federal district court for the western district of Pennsylvania, and was ecided in the same way, Judge Thomson saying: "Surely such classification is unjust nd arbitrary in the extreme, violating both the letter and the spirit of the Fifth mendment." (*United States v. Yount,* 267 Fed. 861.) The circuit court of appeals f the second circuit held the Lever Act constitutional as a war measure. Judge

Manton in his opinion concluded that the exemption in favor of the farmers was not under the circumstances then existing, so palpably arbitrary as to authorize a judicial review of the legislative judgment. It is to be noted, however, that Judge Manton's opinion cannot be regarded as the opinion of the court in that case. His associates concurred specially in separate opinions. Judge Ward based his concurrence upon the extraordinary powers vested in Congress for the maintenance of the national security in time of war. Judge Hough emphasized this by saying, "If we were in a state of `official' peace, this statute would . . .be constitutionally obnoxious because it is a gross piece of class legislation; incapable of distinction from that condemned in *Connolly v. Union etc. Co.,* 184 U.S. 540 [46 L. Ed. 679, 22 Sup. Ct. Rep. 431; see, also, Rose's U.S. Notes]. But the statute is begotten by war, and is constitutionally excused (i.e., justified) by the war power, which is superior to, and not to be measured by, the police powers of the several states." (*C.a. Weed & Co. V. Lockwood,* 266 Fed. 785.) It may be noted in passing this decision of the circuit court of appeals was in effect reversed by the supreme court, but upon other grounds without passing upon the validity of the exemption in favor of the farmers (*C.A. Weed & Co. V. Lockwood,* 255 U.S. 104 [65 L. Ed. 532, 41 sup. Ct. Rep. 305, see, also Rose's U.S. Notes]). We do not mean to infer that every classification based upon distinction between the farmers on the one hand and all other persons on the other is unconstitutional, but we are impelled to conclude that no natural, intrinsic or constitutional distinction is to be found on a basis for the exemption of the transportation companies described in the 1923 amendment, *supra*, from the regulations prescribed in the Auto Stage and Truck Transportation Act, and that such attempted exemption is violative of the fourteenth amendment to the federal constitution and of like provisions in our state constitution. It is not claimed, and in view of the legislative history of the act could not be claimed, that the provisions of this exception are so intimately and inherently related to and connected with the general provisions to which it relates as to invalidate the latter.

It is ordered that a peremptory writ of mandate issue as prayed herein. Waste, J. Shenk, J., Seawell, J., Lawlor, J., Lennon, J., and Richards, J.,concurred.

[Civ. No. 13008. Second Dist., Div. One. Apr. 27, 1942.]

MOSIER M. MEYER, Appellant, v. BOARD OF PUBLIC WORKS OF THE CITY OF LOS ANGELES et al., Respondents.

[1] Municipal corporations–Officers and Employees-Removal–Proceedings-Notice.–Under Los Angles City Charter, Sec. 112, prohibiting the removal of any skilled employee except for a cause stated in writing and served on him, it is not necessary that all causes that might be suggested for the removal of an employee be, stated in the written notice served on him; the statement of a single cause is sufficient. A written notice sent by the board of public works to the superintendent of street maintenance, stating that he was directly interested in public contracts contrary to the best interests of the city, is in itself a sufficient charge upon which to predicate his removal from office.

[2] Id.–Officers and Employees–Removal–Proceedings–Reinstatement.–Under a city charter provision that to reinstate a discharged employee the civil service commission must find a writing that the person removed "is a fit and suitable person to fill the position from which he was removed," the words "fit and suitable" do not refer merely to information received by the commission during its investigation of the original charges set forth in writing, nor require that the employee must be found fit and suitable mentally and physically to fit the position from which he was removed.

[3] Id.–Officers and Employees–Removal–Proceedings–Reinstatement.–The action of a city civil service commission in finding that a discharged employee as not a fit and suitable person to be reinstated to his position does not constitute an abuse of discretion where his testimony before the commission showed that he gambled for high stakes under circumstances which tended to impair public confidence in him.

[4] Pleading–Conclusions–wrongfulness. – In a proceeding in mandamus to reinstate a discharged city employee after the civil service commission had refused to do so, an allegation that the action of the commission was arbitrary and unlawful was a mere conclusion of law, the truth of which was not admitted by a general demurrer filed by respondents.

[5] Id.–Demurrer-Amendment After Demurrer Sustained.–The fact that a demurrer to a petition for writ of mandate is sustained without leave to amend does not constitute error in the absence of a request for leave to amend.

APPEAL from a judgment of the Superior Court of Los Angeles county. Emmet H. Wilson, Judge. Affirmed.

Proceeding in mandamus to compel petitioner's reinstatement to a city office. Judgment denying relief affirmed.

Loren A. Butts for Appellant.

Earl G. Read, as Amicus Curiae, on behalf of Appellant.

Ray L. Chesebro, City Attorney, Frederck von Schrader, Assistant City Attorney and George William Adams, Deputy City Attorney, for Respondents.

DEMOND, J. Pro tem.–Appellant filed a petition for peremptory writ of mandate to be directed to respondents, "ordering and commanding the respondent Board of Public Works of the City of Los Angeles to reinstate the petitioner to the position of Superintendent of Street Maintenance, Bureau of Engineering, Department of Public Works of the City of Los Angeles, and to permit him to perform the duties of said position and to restore to him all the rights incident to said position and to cause demands and pay checks to be issued to said petitioner for the amount of salary or wages due the petitioner from the 1st day of August, 1940, until restored to duty, at the rate of Four Hundred Seventy-five Dollars ($475.00) per month, and

"Ordering and commanding the respondent Board of Civil Service Commissioners to certify that petitioner has been duly and regularly appointed to the position of Superintendent of Street Maintenance, Bureau of Engineering, Department of Public Works of the City of Los Angeles, and approve the salary or compensation due him from December 31, 1939, and

"Ordering and commanding the respondent Dan O. Hoye, Controller of the City of Los Angeles, to approve the demand in the sum of Three Thousand Three Hundred Twenty-five Dollars ($3,250.00), drawn in favor of petitioner and delivered to the said Dan O. Hoye, all in accordance with the order and instructions of the Council of the City of Los Angeles, as hereinabove set forth, and to approve all other demands or pay checks when presented to him for approval and

"Ordering and commanding the respondent Leon V. McCardle, Treasurer of the City of Los Angeles, to pay said demands or pay checks when presented to him for payment . . ."

A demurrer was filed to said petition, alleging that it did not "state facts sufficient to constitute a cause of action or to support the issuance of a Writ of

Mandate against the respondents or any of them or to entitle petitioner to any relief at all." The trial court sustained this demurrer, and petitioner having declined to amend his petition, the court then entered judgment decreeing that the petitioner take nothing by reason of his action against the respondents or either or any of them. The appeal is from this judgment.

In December of 1939 the appellant, then holding the position of superintendent of street maintenance, received the following communication:

"Los Angeles, Calif., December 22, 1939.

"To the Honorable

The Board of Civil Service Commissioners,

1100 City Hall, Los Angeles, Cal.

"Gentlemen:

"You are hereby notified that we have this day discharged effective December 31, 1939, Mosier M. Meyer from his position as Superintendent of Street Maintenance, Code #8293 (p) in the Bureau of Engineering of the Dept. Of Public Works of the City for the following cause (state fully), to wit:

"As set out in the attached copy of the resolution adopted by the Board of Public Works at its regular meeting on December 22, 1939, which resolution is hereby made a part hereof with the same force and effect as if set out in detail herein.

"(Approved Dec. 22, 1939
Board of Public Works
By Milton Offner, Secretary)

"(If above space is insufficient to state the cause, same may be stated or continued on separate pages and attached hereto. Please sign or initial any attached pages.)

"Respectfully yours,
(Signature) BOARD OF PUBLIC WORKS
OF THE CITY OF LOS ANGELES
CALIFORNIA
(TITLE) By C. B. WORNSOP, President

"RESOLUTION

"WHEREAS, the Board of Public Works for the past approximately to months, conducted an investigation concerning the conduct of Mosier M. Meyer, in relation to his duties for the City of Los Angeles and the Department of Public Works, and has interrogated witnesses and received evidence, both oral and documentary, and the said Mosier M. Meyer has appeared before this Board and testified under oath; and

"WHEREAS, this Board is now of the opinion that the said Mosier M. Meyer should, because of his conduct, be discharged from his official duties;

"NOW, THEREFORE, Be it Resolved:

"That it is the sense of this Board, gained from an examination of witnesses and documents, that the said Mosier M. Meyer has been interested, financially beneficial to himself, in one or more public contracts made by private contractors with the City of Los Angeles, and this Department, and that his explanations relative to his part in relation thereto are unsatisfactory and do not convince this Board that he was not implicated therein, and this Board further states and finds that the said Mosier M. Meyer was directly financially and beneficially interested in said public contracts, contrary to the best interests of the City of Los Angeles, and also contrary to Section 28 of the Los Angeles City Charter; and

"That although it is the finding of the Board that the said Mosier M. Meyer was implicated, as above stated, it is the further finding of the Board that irrespective of the presence or absence of guilt of said Mosier M. Meyer in reference to the Grand Jury charges, the matter of their dismissal, and the unsatisfactory explanations to this Board of said Mosier M. Meyer in relation thereto, have resulted in public scandal; and remaining unsatisfactorily explained the further retention of said Mosier M. Meyer as an employee of the Department will result in prejudice to the good order of the Department and loss of public confidence therein; and

"This Board further finds that he has otherwise shown himself unsatisfactory and untrustworthy as a public employee, as more specifically shown by the said evidence and records in said investigation;

"BE IT FURTHER RESOLVED that all evidence, both oral and documentary, and transcripts, be and the same are hereby ordered filed as part of the records of this Department, and reference is now made to the same and the same are hereby made a part of this Resolution;

"BE IT FURTHER RESOLVED that the said Mosier M. Meyer be and he is hereby removed and discharged from his said position as Superintendent of Street Maintenance (Code #8293 (p) effective December 31, 1939;

"BE IT FURTHER RESOLVED, that the Secretary of this Board be, and he is hereby directed to prepare the notice of removal and discharge in accordance with the provisions of the Charter setting forth the substance of this Resolution therein and serve the same forthwith upon the said Mosier M. Meyer and certify the same to the Civil Service Commission."

Appellant had first entered the employ of the city of Los Angeles in the year 1914, working as a chainman on the engineering force, and gradually rose from the ranks until January of 1924, when he was promoted to the position of

superintendent of street maintenance, which office he continued to hold until he was removed.

Within five days after the receipt of the notice of his removal effective December 31, 1939, appellant filed with the board of civil service commissioners an answer denying generally and specifically each and every allegation contained in the charges made by the board of public works and asked that the "purported charges be investigated and that this honorable board also investigate the alleged grounds for his attempted removal." Thereafter, following a hearing, the board of civil service commissioners adopted a resolution reading as follows:

"WHEREAS, the Board of Public Works discharged Mosier M. Meyer as of December 31, 1939, for cause, following which under Charter section 112, he requested investigation of the discharge by the Board of Civil Service Commissioners, which now has completed its investigation.

"BE IT HEREBY RESOLVED, by the Board of Civil Service Commissioners:

"1. That the grounds stated for the discharge are not proved to the satisfaction of this Board by the evidence submitted or obtained; and likewise are not satisfactory disproven by the testimony of Mosier M. Meyer or by the other testimony and documents relied on by him;

"2. That inasmuch as Mosier M. Meyer in his own behalf presented testimony from which this Board concludes be habitually engaged in gambling for high stakes, over a period of years, under circumstances which tended and may yet tend to impair public confidence in him and his department, this Board does not find him a fit and suitable person for reinstatement.

"3. That these findings be placed in full upon the minutes of the Board, together with the following statement;

"This Board recognizes a duty to determine whether cause exists for discharge, independently of the discharging authority. Because of lapse of time the truth or falsity of the charges here perhaps never will be adjudicated by any law court. In justice to the public and to Mosier M. Meyer, we therefore have taken a long time to investigate and consider.

"The inquiry before the Board of Public Works is indicated by the record to have been far from calm and dispassionate. Mosier M. Meyer objected to the fairness of that inquiry; and therefore this Board extended every opportunity for him and his counsel to appear before this Board, to present evidence, and to call witnesses, in his own behalf.

"The action of the Board of Public Works rests in part on written assertions of Clarence L. Holt. Much delay resulted from an attempt to bring Clarence L. Holt before this Board for questioning by this Board and Mosier M. Meyer. When subpoenaed Clarence L. Holt disappeared, and has not yet been found in the

State.

"Mosier M. Meyer has not satisfactorily accounted for his unexplained sources of income, which gave rise to the charge that he had been unlawfully interested in public contracts. He has not cooperated in presenting the related accounts of his wife. His only explanation of the large increments in his own account were that presumably they resulted from his gambling. The checks he exhibited to fortify this explanation were not helpful and did no more than establish other sufficient grounds for discharge, based upon his gaming habits.

"In his former position we are satisfied Mosier M. Meyer was not incompetent, and some testimony indicated extraordinary capacity and workmanship.

"So long as the principal charge remains neither completely proved, nor yet disproved, unfortunately a lack of public confidence in him can reasonably have been thought to exist by his superiors. They, and not this Board, have the duty to determine whether this is to the ultimate detriment of the city and whether disciplinary action should accordingly be taken. Since passage of money through gaming is a traditional method of bribery, extensive gaming by one in a responsible position connected with public works may lead to further public distrust and suspicion, though he may not in fact be corrupt or corrupted.

"Under such circumstances, this Board performing its duty under section 112 of the Charter cannot and does not find Mosier M. Meyer to be a fit and suitable person, so as to set aside the discharge made by the Board of Public Works, effective December 31, 1939."

Following this action by the board of civil service commissioners, the City Council of Los Angeles considered the matter, as will appear form the following record attached as an exhibit to appellant's petition:

"Mr. Thrasher: I move, as a substitute motion that the claim of Mosier M. Meyer, for salary due him at the rate of $475.00 per month from January 1, 1940 to July 31, 1940, in the amount of $3,325.00 be allowed; that the money be allocated from the Reserve Fund to the Unappropriated Balance, and the demands be drawn from same for the following reasons:

"1. That the Board of Public Works discharge Mr. Meyer December 31, 1939, on certain charges that were preferred by them, but were never proven by said Board of Public Works, and which were later referred to the Board of Civil Service Commissioners for review, as provided by the City Charter.

"2. That the Board of Civil Service Commissioners, after investigation, were not satisfied with the evidence submitted and did not sustain the findings of the Board of Public Works.

"3. That the grounds upon which the Board of Civil Service Commissioners did discharge Mr. Meyer, were allegedly, frequently indulging in gambling in private

life six and one-half years ago.

"4. That the testimony given proved that the gambling referred to was conducted on Mr. Meyer's own time, and not when he was on duty and paid by the City.

"5. The Board of Civil Service Commissioners stated `in his former position, we are satisfied Mr. Mosier Meyer was not incompetent, and some testimony indicated extraordinary capacity in workmanship."

"No evidence was presented at any time that indicated that the activities referred to interfered in any shape or manner with the performance of his duties as a City Employee.

"Under these circumstances I believe this unjust discrimination against Mr. Meyer should be rectified by the payment of his salary claim.

"WHICH SUBSTITUTE MOTION, BEING DULY SEC. BY MR. GAY, WAS ADOPTED."

On September 5, 1940, the acting mayor of Los Angeles addressed the following communication to the members of the council:

". . .with reference to File No. 1039 (1940) returned herewith concerning your action of August 29, 1940, in approving of the transfer of $3,325.00 from the Reserve Fund to the Unappropriated Balance for the payment of the claim of Mosier M. Meyer for salary allegedly due him as Superintendent of Street Maintenance at the rate of $475.00 per month from January 1, 1940 to July 31, 1940, you are advised as follows:

"In view of the attached statements of the City Attorney, Controller and the Bureau of Budget and Efficiency I feel compelled to disapprove of the appropriation. This disapproval is based entirely upon my understanding that such a payment would be contrary to the provisions of the City Charter and does not indicate a concurrence in, or approval of the action of the Board of Public Works or Civil Service Commission. "Yours truly

(Signed) R.L. BURNS.

Acting Mayor."

On September 24, 1940, the appropriation was passed over the veto of the acting mayor and a demand for payment of the salary claim to July 31, 1940, was delivered to respondent Hoye, controller of the city of Los Angeles. He refused to allow or approve the claim and shortly thereafter, on October 1, 1940, the petition for a writ of mandate was filed.

For convenience in discussing the matters presented by this appeal, the board of public works will hereafter be called the board, and the board of civil service commissioners the commission.

Section 112 of the charter of the city of Los Angeles provides ". . . but no person

in the classified civil service of the city, other than an unskilled laborer employed by the day, shall be removed, discharged or suspended except for cause, which shall be stated in writing by the board or officer having the power to make such removal, discharge or suspension, and filed with the board of civil service commissioners, with certification that a copy of such statement has been served upon the person so removed, discharged or suspended, personally, or by leaving a copy thereof at his last known place of residence if he cannot be found. Upon such filing such removal, discharge or suspension shall take effect. Within fifteen days after such statement shall have been filed, the said board, upon is own motion, may or upon written application of the person so removed, discharged or suspended, filed with said board within five days after service upon him of such statement, shall proceed to investigate the grounds for such removal, discharge or suspension. If after such investigation said board finds, in writing, that the grounds stated for such removal, discharge or suspension were insufficient or were not sustained, and also finds in writing that the person removed, discharged or suspended is a fit and suitable person to fill the position from which he was removed, discharged or suspended, said board shall order said person so removed, discharged or suspended, to be reinstated or restored to duty. The order of said board with respect to such removal, discharge or suspension, shall be forthwith certified to the appointing board or officer, and shall be final and conclusive. . . .any person removed, discharged or suspended under the provisions of this section be reinstated or restored as above provided, the person so removed, discharged or suspended shall be entitled to receive compensation from the city the same as if he had not been removed, discharged or suspended by the appointing board or officer."

[1] As his first ground of reversal, appellant claims that the cause referred to in the resolution which was adopted by the board is only partially stated in that resolution, in that "the evidence, both oral and documentary, and the reporter's transcript referred to in said resolution and made a part of the cause for his removal, were not served upon him or filed with the commission as required by section 112 of the charter of said city." He cites the case of *Shannon v. City of Los* Angeles, 205 Cal. 366 [270 Pac. 682], as authority for the rule requiring strict compliance with the requirements of section 112 of the charter of the city of Los Angeles by the discharging authority in order to lawfully or effectively remove an employee in the classified civil service of said city." In that case the petitioner had not received the written notice of the charge made against him as required by charter, and relied successfully upon the deficiency to secure reinstatement.

We are unable to apply the reasoning of the Shannon case to the facts of the instant case. There is no requirement that all causes that might be suggested for

removal of an employee be stated in the written notice served upon him; the statement of a single cause is sufficient, and in this case it was charged by the board that the petitioner should be discharged from his official duties because of his conduct. The conduct then is itemized, to the effect, according to the finding and statement of the board, that "said Mosier M. Meyer was directly, financially and beneficially interested in said public contracts, contrary to the best interests of the city of Los Angeles, and also contrary to section 28 of the Los Angeles City Charter. " This in itself is a sufficient charge upon which to predicate the removal of a public employee. A further analysis of the notice and its attached resolution indicates that other causes that the one itemized above were specified therein; but the entire discussion concerning the causes for discharge becomes academic when we consider that the commission, upon the matter being referred to it, decided that "The grounds stated for the discharge are not proven to the satisfaction of this board by the evidence submitted or obtained; and likewise are not satisfactorily disproven by the testimony of Mosier M. Meyer or by the other testimony and documents relied on by him . . ." This last paragraph reads, as counsel for amicus curiae "All City Employees' Association of Los Angeles" suggests, like a "Scotch verdict." At any rate, there is no finding here on the part of the commission tha the grounds stated for petitioner's removal were sufficient or that they were sustained. If petitioner had been above to disprove the grounds stated for his discharge, the commission undoubtedly would have made an entry to that effect, but even though they did not do so, we can say definitely that "the grounds stated for such removal," in the language of the charter "were sufficient or were not sustained."

However, to reinstate an employee in such a situation, it is necessary that the commission find "in writing, that the person removed . . . *is a fit and suitable person to fill the position from which he was removed* . . ." (Italics added.) Here the petitioner is unfortunate, for the commission, as hereinbefore noted, made its finding, number 2, directly to the contrary and amplified that finding in the closing paragraphs of its resolution.

[2] Appellant complains that "The action of the commission in finding or purporting to find that appellant was not a fit and suitable person to be reinstated to his position was arbitrary and unlawful," and that the statement relating to his having been engaged in gambling for high stakes under circumstances which "tended and may yet tend to impair public confidence in him and in the Department of street maintenance . . .was and is arbitrary, capricious, fraudulent, wrongful and unlawful." In the brief filed by amicus curiae, it is argued that the words "fit and suitable," "have a limited meaning and can only refer to information received by the commission during the course of its investigation of

the `cause which shall be stated in writing . . .' and which establishes that the employee affected has become physically or mentally unfit or unsuitable to fill the former position."

"This must be so," it is contended, "otherwise the provisions requiring service of notice setting forth the cause in writing, which is primarily designed for the purpose of giving employees adequate notice of the charges against them and an opportunity to prepare a defense before the commission, would have no meaning or effect." It is further argued that: ". . .this phrase does not come into operation, unless the employee has been acquitted on the original charges. . . .that this phrase is used here has nothing to do with moral delinquencies or offenses, or any connection with grounds of discharge, unless the same were the basis of the original charges set forth in writing in the notice and served on the employee." It is also pointed out that "a person is presumed innocent until proven guilty"; and that ". . .these words have a limited meaning and can only refer to information received by the commission during the course of its investigation of the `cause which shall be stated in writing . . .' and which establishes that the employee affected has become physically or mentally unfit or unsuitable to fill the former position"; and that ". . . the commission can determine the employee's fitness and suitability only after he has been acquitted of the charges brought against him, the charges set forth in writing, filed and served on him." But in our opinion the determination of what the charter means when it says "fit and suitable" depends upon the rules commonly applicable to construction and interpretation. In that connection it must be emphasized that the courts are without power to legislate, and all tendencies on the part of the judicial branch of the government to legislate by judicial decision are uniformly frowned upon.

Webster's Dictionary defines the word "fit" as "suitable to a standard of duty, propriety or taste," and the same authority furnishes "fit" as a synonym for "suitable." To us the very definition of the word "fit" indicates that there are few words in our language that have a broader significance and since the Los Angeles Charter does not specify that the employee must be found fit and suitable mentally and physically to fill the position from which he was removed we cannot give the words the special and restricted application which is suggested.

As to the presumption of innocence mentioned by counsel it may be said that the rule has no application to the issues here involved.

In answer to the arguments of appellant's counsel and of the friend of the court, respondents call our attention to the fact that the charter itself, adopted by the people of Los Angeles, constitutes the board of civil service commissioners a tribunal to determine upon an investigation, such as transpired in this case, not only whether or not the stated cause of removal is sufficient or sustained, but also

whether the employee is fit and suitable to fill the position in which he seeks to be retained. It is claimed that this is a matter committed to the discretion of the board of civil service commissioners, and since it has unquestioned jurisdiction, and has made its investigation and findings thereon, its order is "final and conclusive," as provided by the charter.

[3] It does not appear that the order of the commission was based on any prejudice against appellant, for, so far as the record indicates, he was given a fair and adequate hearing by the commission which found on the one hand that the charges against him were not proven and that he was not incompetent to perform the duties of the position which he had held, but on the other hand made the adverse finding upon the evidence before it as to fitness and suitability which bars appellant from reinstatement. Paragraph "2" of the commission's resolution recites, as will be noticed, that the petitioner in his own behalf presented testimony from which the commission concluded that he habitually engaged in gambling for high stakes over a period of years under circumstances which tended and may yet tend to impair public confidence in him and in his department. We do not know exactly what testimony appellant presented to the commission but he did attach to his petition a document concerning which, in his petition, he made the following statement: ". . .all of the evidence submitted to said respondent board of civil service commissioners or obtained by it during the course of the investigation conducted by said respondent Board concerning the gambling indulged in by petitioner, the reputation of petitioner and the confidence which his superiors and the public had in petitioner and in the department of street maintenance, bureau of engineering, department of public works of the city of Los Angeles, is attached hereto, marked Exhibit "F" and hereby referred to and by such reference made a part hereof." Exhibit "F," it appears from its caption, is the "Statement of Mosier Meyer, Taken in the Office of the District Attorney (of Los Angeles County) on October 24, 1934." Excerpts are as follows: "People who know me, know that I gamble quit a lot. It won't be hard to verify. . . .I have won as much as $1500 in one pot, just one pot. . . .I carry around, or have carried around until I practically wore them out, I.O.U.'s to the extent of about $5,000 in my pocket. . . .only time I ever played with Mr. Moore was pretty close to seven years ago, when the contractors had a room in this building at First and Spring, on the second floor, there used to be a poker game there, and I sat in the game several times and Tom Moore was working for the Consolidated Rock Co. At that time. . . .Q. Now, your winnings at cards, how do you get paid off when you win at cards. A. Cash, money as a rule, sometimes a check, sometimes I.O.U.'s which is not always very good. . . .Q. During the last few years, you have deposited quite a little money? A. Deposited and drew out,

etc. Q. For example, in August of 1932, you deposited $1500 in cash? A. Possible. Q. Even in your league, that is a lot of money. I mean, a man in your station in life, associating with the people you associate with, and considering the stakes that you play for at cards, $1500 is still not a drop in th bucket for you? A. Well, it is not a very substantial sum. I have made more than that on a real estate deal. Q. Well, I will just itemize some of these, Mr. Meyer. Starting back in January, of 1931, you deposited $116 in cash. That is not very much. In April of 1931, you deposited, on April 7, $200, and on the 22nd, $100. All in cash. June, 1931, $225, again in June, $200, and again, $100, making in that month alone $525. A. I must have been doing pretty good that month. . . . Q. In January of 1932, $1100; in May, $1550; June, $1025; July, $500; September $1500; January, 1933, $1000, etc. Making a considerable amount of money, I should say, roughly speaking, about $15,000 in less than three years, aside from your city warrants and aside from your salary checks, this in cash money of the realm. Real shekels. Let's figure here. Giving you by far the benefit of the doubt, your income from those two houses would be $2500, and your explanation is that there was about $12,000 that you won in gambling? A. I could not say that because I have done some other things beside. . . .Q. All we can account for is about $2500, roughly speaking, from rents, and that leaves a balance of $12,000 that would have to charge to what you won in gambling? A. There is one more thing to clarify that slightly, that is I may have made a little money that I don't recall at this moment, that I will recall, that might be inconsiderable in amount as toward that sum, but that amount of money I say was all my power games–I have won more money than that. Q. In the last three years playing poker? A. Yes I really have." The recitals in this document presented to the court by the petitioner himself as part of the pleadings in the case furnish a sufficient answer to the argument of his counsel that the action of the board of civil service commissioners constituted, not an exercise of discretion, but an abuse of discretion. The excerpts quoted and other statements contained in Exhibit F demonstrate to our satisfaction that the finding by the commission that petitioner's gambling for high stakes under circumstances which tended and yet may tend to impair public confidence in him and in the department of street maintenance was not, as appellant claimed, in paragraph VIII of his petition, "arbitrary, capricious, fraudulent, wrongful and unlawful." [4] This claim and other adjectival descriptions of the action and decision of the commission constitute merely conclusions of law, on the part of the appellant, the truth of which were not admitted by the general demurrer filed by respondents. (See *Jones v. O'Toole*, 190 Cal. 252, 255 [212 Pac.9]; *Kelley v. Kingsbury*, 210 Cal. 37, 39 [290 Pac. 885]; *Buttner v. Kasser*, 19 Cal. App. 755, 758 [127 Pac. 811].) We are of the

opinion that the trial court, in considering and sustaining the demurrer, under the circumstances here presented, did not err. [5] And no error arose because the order was made "without leave to amend," for no application or request was made by the petitioner to amend his pleading. (*Haddad v. McDowell,* 213 Cal. 690 [3 P. (2d) 550].) On the contrary, the record shows as we have indicated, that he declined to amend. Since in our judgment there was no abuse of discretion on the part of the commission, application of all principle referred to in *Brown v. Board of Police Commissioners,* 2 Cal. App. (2d) 245 at page 251 [37 P. (2d) 737], is decisive of this appeal. As stated in *Boyd v. Pendegast,* 57 Cal. App. 504, at page 508 [207 Pac. 713], where an investigation of charges against a removed police officer was made by the board of police commissioners, to which that duty was assigned by the charter of the city of Los Angeles, "When such a hearing has been had, the decision, by the very terms of the charter, is placed beyond the reach of any review by the courts." See, also, *Nider v. City Commission,* 36 Cal. App. (2) 14 [97 P. (2d) 392]; *Souder v. City of Philadelphia,* 305 Pa. 1 [156 Atl. 245, 77 A.L.R. 610].) The Judgment is affirmed.

YORK, P.J., concurred.

DORAN, J., Concurring.–I concur in the judgment. It is my opinion that courts, in proper cases, may legally afford relief by mandamus from wrongs that are the product of fraudulent or arbitrary action of administrative bodies. But mandamus will not lie for the purpose of, nor may courts by resort to such procedure undertake to control or direct administrative boards by, inquiring into the wisdom of their official action. Such problems, although they present opportunity for honest differences of opinion, raise no judicial questions. An allegation of fraud or of arbitrary action, in my opinion, is a necessary element to an action in mandamus under such circumstances.

The briefs on appeal on the part of both the appellant and respondents create confusion by disregarding the sole issue. The appellant states the question involved as follows: "Was the appellant lawfully removed from the position of Superintendent of Street Maintenance, Bureau of Engineering, Department of Public Works of the City of Los Angeles?" The respondents, on the other hand, under the heading "Respondents' Position on This Appeal," assert the following: "Respondents argue, on this appeal: 1. That the order of the Civil Service Commission refusing to reinstate appellant is made final and conclusive, pursuant to the provisions of section 112 of the charter, and is therefore not subject to review by the courts. 2. That even though the civil service commission found that the grounds of removal were neither proven nor disproven, nevertheless it must, in order to reinstate appellant, further find him to be a fit and suitable person to fill the position from which he was removed."

Both positions are entirely beside the issue, and all of the briefs discuss subjects entirely beyond the sole issue involved in the appeal. That issue concerns only the sufficiency of the petition. The prevailing opinion, which follows the briefs, necessarily falls into the same category. For example, the prevailing opinion contains the following: "It does not appear that the order of the commission was based on any prejudice against appellant, for, so far as the record indicates, he was given a fair and adequate hearing by the commission which found on the one hand that the charges against him were not proven and that he was not incompetent to perform the duties of the position which he had held, but on the other hand made the adverse finding upon the evidence before it as to fitness and suitability which bars appellant from reinstatement." In my judgment, the determination of such questions on appeal has no bearing on the sufficiency of the pleadings.

Appellant elected to stand on the petition as presented, and declined to amend. I am in accord with that part of the prevailing opinion which holds in substance and effect that the allegation of fraud was a conclusion and therefore was insufficient. It follows that the demurrer properly was sustained.

Appellant's petition for a hearing by the Supreme Court was denied June 25, 1942.

FIRST CONGREGATIONAL CHURCH OF GLENDALE (A Religious Corporation), Appellant v. COUNTY OF LOS ANGELES et al., Respondents.

[1] TAXATION–PAYMENT–PROTEST–RECOVERY–STATUTORY CONSTRUCTION.–Under section 3819 of the Political Code, payment of taxes may be made to a county tax collector under particular conditions during a specified period and, where the requirements of the statute are complied with, an action will lie to recover the amount paid; and when the property owner pays taxes in the manner specified he is not required to plead or prove that the payment was made under compulsion or coercion.

[2] Id.-RELIGIOUS CORPORATIONS-PAYMENT–PROTEST–RECOVERY–REMEDIES.–The language used by the legislature in enacting section 3819 of the Political Code is plain and needs no construction, and the benefits of said section can only be obtained by those who follow its requirements; and where the property of a religious corporation is assessed for county taxes, notwithstanding it filed an affidavit as required by section 3611

of said code, and it does not make payment to the tax collector in accordance with the provisions of said section 3819, and the property is sold to the state for delinquent taxes, the subsequent payment to the county treasurer, under protest, of the tax assessed, with penalties, costs and interest, is not a compliance with the requirements of said section 3819.

APPEAL from a judgment of the Superior Court of Los Angeles County. Robert W. Kenny, Judge. Affirmed. The facts are stated in the opinion of the court.

James P. Mackel for Appellant.

Everett W. Mattoon, County Counsel, D. De Coster, Chief Dputy County Counsel and Gordon Boller, Deputy County Counsel for Respondents.

Holmes L. Martin, as *Amicus Curiae* for Appellant.

EDMONDS, J.–The appellant is a religious corporation owning real property which it claims is exempt from taxation under the provisions of section 1-1/2 of article XIII of the Constitution of California. In the year 1930 it failed to file an affidavit stating facts concerning the ownership and use of the property for religious purposes as required by section 3611 of the Political Code. Thereafter, on June 30, 1931, the respondent County of Los Angeles sold the property to the state for delinquent taxes which had been assessed thereon. Appellant then paid to the county treasurer the amount required by law to redeem the property and brought this action to recover the amount so paid. The appeal is prosecuted from a judgment which followed an order sustaining without leave to amend a demurrer to the appellant's complaint.

The complaint alleges that in the year 1930 there was located on the real property in question a church building which was used solely and exclusively for religious worship; "that said building never has been rented for religious purposes and that no rent ever has been received for said building which is used exclusively for religious purposes." It is then alleged that these facts were well known to the assessor and also to the tax collector of the respondent county but that in 1930 the property was assessed to the appellant upon the assessment roll for that year. According to further allegations of the complaint, after the sale to the state, the appellant tendered to the tax collector of the respondent county and afterward paid to its treasurer an amount equal to the tax assessed against the property, with penalties, costs and interest, the payment being accompanied by a notice of protest in writing. This notice recites that the appellant "under protest and in no sense as a voluntary payment, pays to you the amount of said taxes with the aforesaid penalties, costs and interest . . .claiming to right to recover back and to have repaid to it the whole of said amount of said alleged tax and accrued penalties, costs and interest. . . . "

The appellant bases its right to recover upon section 3819 of the Political Code. This section provides that "At any time after the assessment-book has been received by the tax collector, and the taxes have become payable, the owner of any property assessed therein, who may claim that the assessment is void in whole or in part, may pay the same to the tax collector under protest, which protest shall be in writing, and shall specify whether the whole assessment is claimed to be void, or if a part only, what portion, and in either case the grounds upon which such claim is founded and when so paid under protest, the payment shall in no case be regarded as voluntary payment." Obviously the time when payment may be made to the tax collector under he provisions of this section is the period between the date when the equalized, certified assessment roll is turned over to him by the auditor, which by section 3732 is required to be done on or before the first day of October of each year, and June 30th of the following year. The appellant concedes that at the time it made a tender to the tax collector no taxes for the fiscal year 1930 could legally be paid to him, but it contends that as the Political Code section allowing the payment of taxes under protest is a remedial statute, it should have a liberal construction, and that under such a construction payment to the county treasurer, even after the time specified therein for payment to the tax collector, is a sufficient compliance with its requirements.

[1] section 3819 of the Political Code was undoubtedly enacted by the legislature to provide a simple and direct method for the owner of property to challenge a tax levied against it. It gives a property owner the right to pay the tax and then bring an action to recover the amount of the payment, "and when the directions of the act are followed it is provided that the payment of the tax `shall in no case be regarded as a voluntary payment'". (*Stewart Law & col. Co. V. County of Alameda,* 142 Cal. 660 [76 Pac. 481, 483].) Under its provisions payment of taxes may be made to a county tax collector under particular conditions during a specified period and where the requirements of the statute are complied with an action will lie to recover the amount paid. When the property owner pays the taxes in the manner specified he is not required to plead or prove that the payment was made under compulsion or coercion.

[2] The language used by the legislature in enacting these provisions is plain, and requires no construction. Under such circumstances the only function of he court is to apply the terms of the enactment to the facts presented. (*Wilsonv. Johnson,* 1 Cal. (2d) 288 [34 Pac. (2d) 487].) To hold that payment to the county treasurer of the amount required for the redemption of property sold for taxes meets the requirements of a statute allowing payment to the tax collector of the amount of taxes before a sale of the property would substitute conditions entirely different from those laid down by the legislature. No rule of construction allows

a change in the express terms of a statute. The benefits of this section can only be obtained by those who follow its requirements and the payment made by the appellant did not comply with its provisions in any essential particular.

The judgment is affirmed.

Shenk, J., Curtis, J., Langdon, J., Seawell, J., and Waste, C.J., concurred.

SPRINGER ET AL. V. GOVERNMENT OF THE PHILIPPINE ISLANDS.
AGONCILLO v. SAME.
CERTIORARI TO THE SUPREME COURT OF THE PHILIPPINE ISLANDS.
Nos. 564 and 573. Argued April 10, 1928.–Decided May 14, 1928.

1. Acts of the Philippine Legislature creating a coal company and a bank, the stock of which is largely owned by the Philippine government, provide that the power to vote the stock shall be vested in a "committee," in the one case, and in a "Board of Control," in the other, each consisting of the Governor General, the President of the Senate, and the Speaker of the House of Representatives. *Held,* that the voting of the stock in the election of directors and managing agents of the corporation is an executive function, and that the attempt to repose it in the legislative officers named violates the Philippine Organic Acct. P. 199.

2. In the Philippine Organic Act, which divides the government into three departments–legislative, executive, and judicial–the principle is implicit, as it is in state and federal constitutions, that these three powers shall be forever separate and distinct from each other. P. 201.

3. This separation and the consequent exclusive character of the powers conferred upon each of the three departments of the government, is basic and vital–not merely a matter of governmental mechanism. *Id.*

4. It may be stated as a general rule inherent in the American constitutional system, that, unless otherwise expressly provided or incidental to the powers conferred, the legislature cannot exercise either executive or judicial power; the executive cannot exercise either legislative or judicial power; and the judiciary cannot exercise either executive or legislative power. *Id.*

5. Legislative power, as distinguished from executive power, is the authority to make laws, but not to enforce them or to appoint the agents charged with the duty of enforcing them. The latter are executive functions. *Id.*

6. Not having the power of appointment, unless expressly granted or incidental to its power, the legislature cannot engraft executive duties upon a legislative office, since that would be to usurp the power of appointment by indirection. *Id.*

7. The appointment of managers (in this instance corporate directors) of property or a business in which the government is interested, is essentially an executive act which the legislature is without capacity to perform, directly or

through its members. P. 203.

8. Whether or not the members of the "board" or "committee" are public officers in the strict sense, they are at least public agents charged with executive functions and therefore beyond the appointing power of the legislature. *Id.*

9. The instances in which Congress has devoted on persons not executive officers the power to vote in non-stock corporations created for governmental purposes, lend no support to a construction of the Constitution which would justify Congressional legislation like that here involved, considering the limited number of such instances, the peculiar character of the institutions there dealt with, and the contrary attitude of Congress towards governmentally owned or controlled stock corporations. P. 204.

10. The powers here asserted by the Philippine Legislature are vested in the Governor General by the Organic Act; viz., by the provision vesting in him the supreme executive power, with general supervision and control over all the departments and bureaus of the government; the provision placing on him the responsibility for the faithful execution of the laws; and the provision that all executive functions of the government must be directly under him or within one of the executive departments under his supervision and control. P. 205.

11. Where a statute contains a grant of power enumerating certain things which may be done, and also a general grant of power which, standing along, would include those things and more, the general grant may be given full effect if the context shows that the enumeration was not intended to be exclusive. P. 206.

12. In Sec. 22 of the Organic Act, the clause in the form of a proviso placing all the executive functions directly under the Governor General or in one of the executive departments under his direction and control, and the proviso preceding it which grants certain powers to the legislature, are both to be construed as independent and substantive provisions. P. 207.

13. An inference that Congress has approved an Act of the Philippine Legislature reported to it under Sec. 10 of the Organic Act cannot be drawn from the failure of Congress to exercise its power to annul, reserved in that section, where the Act reported contravenes the Organic Act and is therefore clearly void. P. 208. Affirmed.

CERTIORARI, 275 U.S. 519, to two judgments of ouster rendered by the Supreme Court of the Philippine Islands in proceedings in the nature of *quo warranto,* which were brought in that court by the Philippine Government against the present petitioners, to test their right to be directors in certain corporations described in the opinion.

Mr. John W. Davis, with whom *Messrs. Jose a. Santos, James Ross, Quintin Paredes, and Claro M. Recto* were on the briefs, for petitioners.

The voting power of the government-owned stock in the National Coal Company is not an office, and all of the respondents's contentions as to an alleged invasion of the Governor-General's asserted general power of appointing persons to public office are, for that reason, quite beside the point. *Sheboygan County v. Parker,* 3 Wall. 92; *United States v. Hatch,* 1 Pin. (Wis.) 182; *United States v. Hartwell,* 6 Wall. 385; *United States v. Germaine,* 99 U.S. 508; *State v. Kennon,* 7 Oh. St. 546; *In the Matter of Oaths,* 20 Johnson, *492; Bank of United States v. Planters Bank,* 9 Wheat. 904. This latter case has even followed in *Bank of Kentucky v. Wister,* 3 Pet. 431; *Briscoe v. Bank of Kentucky,* 11 Pet. 323; *Darrington v. Bank of Alabama,* 13 How. 12; *Curran v. Arkansas,* 15 How. 304; *Sloan Shipyards Corp'n. V. U.S. Shipping Board,* 258 U.S. 549, and in other cases. *C.&D. Canal Co. V. United States,* 250 U.S. 123; *Shoemaker v. United States,* 147 U.S 82.

The Philippine Legislature has all general legislative powers such as are exercised by States and Territories.

The voting of the government-owned stock is merely a part of the machinery for the management of the corporation, and, under the Legislature's power to create corporations for the attainment of objects within its powers and to provide for the organization of such corporations and for their management, the Legislature may confer the voting power of the corporate stock as it sees fit.

Congress has often created corporations to act for it in the attainment of these objects that are within its powers and has often given over the voting power in such corporations to persons other than executive officers of the Government, or–what is the same thing where the corporations have been without capital stock–it has given over the management of the corporations to such persons. Examples of the latter sort are the Smithsonian Institution and the National Home for Disabled Soldiers.

A more frequently used extra-governmental means for the attainment of Congressional objectives has been the privately owned stock company, such, for example, as those concerned in *California v. Pacific R.R. Co.,* 127 U.S. 1, and *Luxton v. North River Bridge Co.,* 153 U.S. 525.

Plainly, corporations such those involved in the two foregoing cases exercise the functions that some executive departments would exercise if Congress chose to "use its sovereign powers directly." Yet, despite this fact and despite the fact that such corporations are instruments through which Congress exercises portions of its sovereign power, it has nevertheless been usual to confide to the private stock owners in such corporations the power of control through the stock-voting power.

Government ownership, this Court has repeatedly held, is insufficient to bur the

corporate lines that separate such corporations as that herein concerned from the government that has created them. *Bank of United States v. Planters Bank,* 9 Wheat. 904; *Bank of Kentucky v. Wister,* 3 Pet. 431; *Briscoe v. Bank of Kentucky,* 11 Pet. 324; *Darrington v. Bank of Alabama,* 13 How. 12; *Curran v. Arkansas,* 15 How. 304; *Sloan Shipyards Corp'n. V. U.S., Shipping Board,* 258 U.S. 549; *United States v. Strang,* 254 U.S. 491; *Skinner & Eddy v. McCarl,* 275 U.S.1.

Where the extra-governmental entity is chosen, the cases indicate that insofar as the management of its corporate affairs is concerned, the corporation so created is in the fullest degree a separate entity. The only blurring of the corporate lines has been in the extension of governmental privileges and protection to such corporations. *Russel Motor Car Co. V. United States,* 261 U.S. 541; *United States v. Walter,* 263 U.S. 15; *Clallam County v. United States,* 263 U.S. 341; *U.S. Grain Corp'n. V. Phillips,* 261 U.S. 16; *Emergency Fleet Corp'n. V. Western Union,* 274 U.S. 415.

Conceding, *arguendo,* that the corporate entity of the National Coal Company may be disregarded and that the power of voting the government-owned stock may be regarded as a duty of caring for government property, that voting power, as such a duty, is nevertheless properly confided to legislative officers.

It is well settled that sec. 3 of Art. IV of the Constitution, neither the President nor the heads of any of the executive departments have any powers in respect to the use or disposal of public property apart from those given them by Congress. *Pan American Petroleum Co. V. United States,* 273 U.S. 456; *Mammoth Oil Co. V. United States,* 274 U.S. 13; *United States v. Hare,* Fed. Cas. No. 15,303; *Knote v. United States,* 18 Ct. Cls. 352; *Lear v. United States,* 50 Fed. 65; *United States v. Nichol,* Fed. Cas. No. 15,879.

The authority of Congress may be given either generally in reference to a class of properties or specifically in reference to a particular property, and Congress can withdraw a pending contest over the right of entry of public lands from the jurisdiction of the land department and itself determine the rights of the parties involved. *Emblem v. Lincoln Land Co.,* 102 Fed. 559, affirmed, 184 U.S. 660.

The powers of Congress in the care of government property are plenary. In that behalf the executive departments are no more than the agents or instrumentalities of Congress. It is plain that the duty of caring for government property, far from being "surely executive," is, in fact, legislative in character. The executive departments ordinarily perform the detail of such care; but to Congress belongs the power of direction and such direction may be as specific as Congress sees fit to make it.

While the constitutional provision is not of course directly applicable to the Philippine Legislature, it and the decisions under it are important as showing the

scope of legislative power in respect of the care, management, use and disposal of government property under the American theory of government.

Officers of the National Coal Company are not officers of the Philippine Government, and the fact that the voting power of the government-owned stock is to be exercised for the purpose, *inter alia*, of selecting such officers, does not make that voting power a part of the Governor-General's asserted power of appointing persons to public office.

If voting the government-owned stock were an office, the President of the Senate and the Speaker of the House of Representatives would be eligible to hold it.

The Governor-General of the Philippine Islands has no general power of appointing persons to public office and the alleged "offices" herein involved would not be within the powers of appointment specifically give to him under the Autonomy Act, even if they were property regarded as "offices" within the meaning of that Act.

The Philippine statutes here in question have received the implied sanction of Congress and should not be disturbed. *Clinton v. Englebrecht*, 13 Wall. 434; *Gromer v. Std. Dredging Co.*, 224 U.S. 362; *Tiaco V. Forbes*, 228 U.S. 549; *Chanco v. Imperial*, 34 Phil. Rep. 329; *United States v. Bull*, 15 Phil. Rep. 31; *Baca v. Perez*, 8 N.M. 187; *Gallardo v. Porto Rico Rwy. Co.*, 18F (2d) 918; *Fajardo Sugar Co. V. Holcomb*, 16 F. (2d) 92; *Myers v. United States*, 272 U.S. 52; *Binns v. United States*, 194 U.S. 486.

Solicitor General Mitchell, with whom *Messrs. Frederick C. Fisher, wm. Cattron Rigby, Hugh C. Smith, Robert P. Reeder*, Special Assistant to the Attorney General, *John A. Hull*, Judge Advocate General, U.S.A., and *Delfin Jaranilla*, Attorney General of the Philippine Islands, were on the brief, for respondent.

The Acts of the Philippine Legislature, read in connection with other statutes relating to the Philippine National Bank, the National Coal Company, and corporations in general, have the effect of stripping the Governor General of all direction or control over the Bank or Coal Company and of vesting the direction of the management and operation of those institutions in representatives of the two Houses of the Legislature selected by those Houses. The President of the Senate and the Speaker of the House of Representatives are selected by those bodies and hold office during their pleasure. They, in turn, acting together on the so-called Board of Control, elect and remove the managing directors and agents of these corporations, and in the case of the Bank, they also directly participate with those officers and agents in conducting the bank's affairs. The effect of these provisions is that the majority in the Legislature, acting through representatives doing their bidding, from day to day direct and control the operations and

management of these institutions.

The selection and removal of the managing directors and officers of corporations, a majority of the stock of which is owned by the Government, and the direction of the operations of those corporations through the exercise of that power, are not legislative functions. They do not constitute the making or repealing of laws or anything incidental to such legislative action. The voting of the Government's stock is itself not legislative, and the depriving of the Governor General of all control of the operations of these corporations is in direction violation of that provision of the Organic Act contained in Sec. 22, which provides that all executive functions must be under the Governor-General or within one of the executive departments under his supervision and control. It is not material whether the relation of the Philippine Government to these corporations are engaged in performing sovereign governmental functions or conducting private business. The power of the Philippine Legislature over matters in which the Philippine Government acts in a proprietary capacity, is legislative. It has no more power to exercise administrative or executive functions over proprietary interests of the Government than it has over sovereign governmental functions, and the exclusion of the Legislature from the participation in administrative or executive functions, and the granting of those functions to the Governor General and his subordinates, operate on all governmental matters whether proprietary or sovereign.

If membership on the "Board of Control" or "Committee" is a separate post or position from that of Governor General or of President of the Senate or of Speaker of the House of Representatives, then the selection by the Legislature or by either House of the persons to occupy that position is beyond legislative power, because in itself that position is beyond legislative power, because in itself an executive act. If the functions to be exercised by members of the Board of Control or Committee are executive or administrative in character, the selection of those members is not a legislative act.

The ultimate question here is again whether voting the stock and directing the affairs of these corporations are executive functions, and it is not important whether the position on the Board of Control or Committee is a separate office or post, or whether the Legislature has merely added certain duties to those of the President of the Senate and the Speaker of the House of Representatives. It may not make appointments to executive or administrative positions, and it may not confer executive or administrative functions on legislative officials.

That Congress has not taken any action to affirmatively annul these statutes is of no consequence. The power reserved in the Organic Act to annul Acts of the Philippine Legislature, relates to valid Acts passed under authority of the Organic

Act and consistent with it. It was never contemplated that Acts of the Philippine Legislature, void because in conflict with the Organic Act, would become valid unless their invalidity be reiterated by Congress within a reasonable time.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

These cases, presenting substantially the same question, were argued and will be considered and disposed of together. In each case an action in the nature of *qu warranto* was brought in the court below challenging the right to hold office of directors of certain corporations organized under the legislative authority of the Philippine Islands, No. 564 involving directors of the National Coal Company and No. 573 involving directors of the Philippine National Bank.

The National Coal Company was created by Act 2705, approved March 10, 1917, subsequently amended by Act 2822, approved March 5, 1919. The Governor-General, under the provisions of the amended act, subscribed on behalf of the Philippine Islands for substantially all of the capital stock. The act provides: "The voting power of all such stock owned by the Government of the Philippine Islands shall be vested exclusively in a committee, consisting of the Governor-General, the President of the Senate and the Speaker of the House of Representatives."

The National Bank was created by Act 2612, approved February 4, 1916, subsequently amended by Act 2747, approved February 20, 1918, and Act 2938, approved January 30, 1921. The authorized capital of the bank, as finally fixed, was 10,000,000 pesos, consisting of 100,000 shares, of which, in pursuance of the legislative provisions, the Philippine Government acquired and owns 97,332 shares, the remainder being held by private persons. By the original act the voting power of the government-owned stock was vested exclusively in the Governor-General, but by the amended acts now in force that power was "vested exclusively in a board, the short title of which shall be `Board of Control,' composed of the Governor-General, the President of the Senate, and the Speaker of the House of Representatives." The Governor-General was also divested of the power of appointment of the President and Vice-President of the bank, originally vested in him, and their election was authorized to be made by the directors from among their own number. Provision was also made for a general manager, to be appointed or removed by the board of directors with the advice and consent of the Board of Control. The manager was to be chief executive of the bank, with an annual salary to be fixed by the board of directors with the approval of the Board of Control. Further duties were conferred upon the Board of Control in connection with the management of the bank which it does not seem necessary to set forth.

It is worthy of note that this voting power has been similarly devolved by the

legislature in the case of at least four other corporations: The National Petroleum Company, by Act 2814; The National Development Company by Act 2849; the National Cement Company, by Act 2855; and The National Iron Company, by Act 2862; and the suggestion of the Solicitor General that this indicates a systematic plan on the part of the legislature to take over, through its presiding officers, the direct control generally of nationally organized or controlled stock corporations would seem to be warranted.

In pursuance of the first quoted provision, petitioners in No. 564 were elected directors of the National Coal Company by a vote of the government-owned shares cast by the President of the Senate and the Speaker of the House; and in pursuance of the second quoted provision, petitioners in No. 573 were elected directors of the National Bank in the same way. The Governor-General, challenging the validity of the legislation, did not participate in either election. While there are some differences between the two actions in respect of the facts, they are differences of detail which do not affect the substantial question to be determined.

On behalf of the Philippine Government, respondent in both cases, it is contended that the election of directors and managing agents by a vote of the government-owned stock was an executive function entrusted by the Organic Act of the Philippine Islands to the Governor-General, and that the acts of the Legislature divesting him of that power and investing it, in the one case, in a "board," and, in the other, in a "committee," the majority of which in each instance consisted of officers and members of the Legislature, were invalid as being in conflict with the Organic Act. The court below sustained the contention of the Government and entered judgments of ouster against the petitioners in each case.

The Congressional legislation referred to as the "Organic Act" is the enactment of August 29, 1916, c. 416,39 Stat. 545, which constitutes the fundamental law of the Philippine Islands and bears a relation to their governmental affairs not unlike that borne by a state constitution to the state. The act contains a bill of rights, many provisions of which are taken from the federal Constitution. It lays down fundamental rules in respect of taxation, shipping, customs, duties, etc. Section 8 of the act provides, "That general legislative power, except as otherwise herein provided, is hereby granted to the Philippine Legislature, authorized by this Act." And by Sec. 12 this legislative power is vested in a legislature, to consist of two houses, one the senate and the other the house of representatives. Provision is made (Sections 13, 14, and 17) for memberships, terms and qualifications of the members of each house. By Sec. 21 it is provided "that the supreme executive power shall be vested in an executive officer, whose official

title shall be `The Governor General of the Philippine Islands.'" He is given "general supervision and control of all of the departments and bureaus of the government in the Philippine Islands as far as is not inconsistent with the provisions of this Act." He is made "responsible for the faithful execution of the laws of the Philippine Islands and of the United States operative within the Philippine islands." Other powers of an important and comprehensive character also are conferred upon him. By Sec. 22 the executive departments of the Philippine government, as then authorized by law, are continued until otherwise provided by legislature. The legislature is authorized by appropriate legislation to "increase the number or abolish any of the executive departments, or make such changes in the names and duties thereof as it may see fit," and "provide for the appointment and removal of the heads of the executive departments by the Governor General." Then follows the proviso: "That all executive functions of the government must be directly under the Governor General or within one of the executive departments under the supervision and control of the Governor General." Section 26 recognizes the existing supreme court and courts of first instance of the Islands and continues their jurisdiction as theretofore provided, with such additional jurisdiction as shall thereafter be prescribed by law.

Thus the Organic Act, following the rule established by the American constitutions, both state and federal, divides the government into three separate departments–the legislative, executive and judicial. Some of our state constitutions expressly provide in one form or another that the legislative, executive and judicial powers of the government shall be forever separate and distinct from each other. Other constitutions, including that of the United States, do not contain such an express provision. But it is implicit in all, as a conclusion logically following from the separation of the several departments. See *Kilbourn v. Thompson,* 103 U.S. 168, 190-191. And this separation and the consequent exclusive character of the powers conferred upon each of the three departments is basic and vital–not merely a matter of governmental mechanism. That the principle is implicit in the Philippine Organic Act does not admit of doubt. See *Abueva v. Wood,* 45 Phil. Rep. 612, 622, 628 *et seq.*

It may be stated then, as a general rule inherent in the American constitutional system, that, unless otherwise expressly provided or incidental to the powers conferred, the legislature cannot exercise either executive or judicial power; the executive cannot exercise either legislative or judicial power; the judiciary cannot exercise either executive or legislative power. The existence in the various constitutions of occasional provisions expressly giving to one of the departments powers which by their nature otherwise would fall within the general scope of the authority of another department emphasizes, rather than casts doubt upon, the

generally inviolate character of this basic rule.

Legislative power, as distinguished from executive power, is the authority to make laws, but not to enforce them or appoint the agents charged with the duty of such enforcement. The latter are executive functions. It is unnecessary to enlarge further upon the general subject, since it has so recently received the full consideration of this Court. *Myer v. United States,* 272 U.S. 52.

Not having the power of appointment, unless expressly granted or incidental to its powers, the legislature cannot engraft executive duties upon a legislative office, since that would usurp the power of appointment by indirection; though the case might be different if the additional duties were devolved upon an appointee of the executive. *Shoemaker v. United States,* 147 U.S. 282, 300-301. Here the members of the legislature who constitute a majority of the "board" and "committee" respectively, are not charged with the performance of any legislative functions or with the doing of anything which is in aid of the performance of any such functions by the legislature. Putting aside the moment the question whether the duties devolved upon these members are vested by the Organic Act in the Governor-General, it is clear that they are not legislative in character, and still more clear that they are not judicial. The fact that they do not fall within the authority of either of these two constitutes logical ground for concluding that they do fall within that of the remaining one of the three among which powers of government are divided. Compare *Myers v. United States, supra,* pp. 117-118.

Assuming, for present purposes, that the duty of managing this property, namely, the government-owned shares of stock in these corporations, is not sovereign but proprietary in its nature, the conclusion must be the same. The property is owned by the government, and the government in dealing with it whether in its quasi-sovereign or its proprietary capacity nevertheless acts in its governmental capacity. There is nothing in the Organic Act, or in the nature of he legislative power conferred by it, to suggest that the legislature in acting respect of the proprietary rights of the government may disregard the limitation that it must exercise legislative and not executive functions. It must deal with the property of the government by making rules, and not by executing them. The appointment of managers (in this instance corporate directors) of property or a business is essentially an executive act which the legislature is without capacity to perform directly or through any of its members.

Whether the members of the "board" or the "committee" are public officers in a strict sense we do not find it necessary to determine. They are public agents at least, charged with the exercise of executive functions and, therefore, beyond the appointing power of the legislature. *Stockman v. Leddy,* 55 Colo. 24, involved a case very much like that now under consideration. The state legislature had

created a committee of its own members to investigate the rights of the state in the flowing waters therein. The committee was authorized to determine what steps were necessary to be taken to protect the rights of the state, to employ counsel, etc. There was no claim that the investigation was for the purpose of ascertaining facts to aid in future legislation or to assist the legislature in its legislative capacity, but it was for the purpose of enabling the committee itself to reach a conclusion as to what should be proper to do in order to protect the rights of the state. The court, in holding the act unconstitutional, said (p.31): "In other words, the general assembly not only passed an act–that is, made a law–but it made a joint committee of the senate and the house as its executive agent to carry out that law. This is a clear and conspicuous instance of an attempt by the general assembly to confer executive power upon a collection of its own members." And the court held that this was invalid under the provisions of the state constitution respecting the tripartite division of governmental powers. See also, *Clark v. Stanly,* 66 N. C. 59; *State ex rel Howerton v. Tate,* 68 N.C. 546.

Petitioners seek to draw a parallel between the power of Congress to create corporations as appropriate means of executing governmental powers and the acts of the Philippine legislature here under consideration. To what extent the powers of the two bodies in this respect may be assimilated we need not stop now to determine, since the power of the legislature to create the two corporations here involved is not doubted. But it is argued further that Congress in creating corporations for governmental purposes has sometimes devolved the voting power in such corporations upon persons other than executive officers. In the case of the Smithsonian Institution, cited as an example, Congress provided for a governing Board of Regents composed in part of members of the Senate and of the House. There are two or three other instances in respect of non-stock organizations of like character. On the other hand, as pointed out by the Solicitor General, in the case of governmentally organized or controlled stock corporations, Congress has uniformly recognized the executive authority in their management, generally providing in express terms that the shares shall be voted by an executive officer, and in no instance attempting to grant such power to one or more of its members. Many instances of this kind are cited by the Solicitor General, but it is not necessary to repeat his enumeration. It is enough to say that, when we consider the limited number of acts of Congress which fall within the first class spoken of above, as well as the peculiar character of the institutions dealt with, and the contrary attitude of Congress toward corporations in a different character, such acts cannot be regarded as lending support to a construction of the Constitution which would justify Congressional legislation like that here involved. As this Court said in *Myers v. United States, supra,* pp. 170-171.

"In the use of Congressional legislation to support or change a particular construction of the Constitution by acquiescence, its weight for the purpose must depend not only upon the nature of the question, but also upon the attitude of the executive and judicial branches of the Government, as well as upon the number of instances in the execution of the law in which opportunity for objection in the courts or elsewhere is afforded. When instances which actually involve the question are rare, or have not in fact occurred, the weight of the mere presence of acts on the statute book for a considerable time, as showing general acquiescence in the legislative assertion of a questioned power, is minimized."

And we are further of the opinion that the powers asserted by the Philippine Legislature are vested by the Organic Act in the Governor-General. The intent of Congress to that effect is disclosed by the provisions of that act already set forth. Stated concisely these provisions are: that the supreme executive power is vested in the Governor-General, who is given general supervision and control over all the departments and bureaus of the Philippine government; upon him is placed the responsibility for the faithful execution of the laws of the Philippine Islands; and, by the general proviso, already quoted, all executive functions must be directly under the Governor-General or within one of the executive departments under his supervision and control. These are grants comprehensive enough to include the powers attempted to be exercised by the legislature by the provisions of law no under review. *Myers v. United States, supra.*

It is true that Sec. 21 contains a specific provision that the Governor-General shall appoint such officers as may now be appointed by the Governor-General, or such as he is authorized by this acct to appoint, or whom he may hereafter be authorized by law to appoint. And it is said that the effect of this is to confine the Governor-General's powers of appointment within the limits of this enumeration. The general rule that the expression of one thing is the exclusion of others is subject to exceptions. Like other canons of statutory construction it is only an aid in the ascertainment of the meaning of the law and must yield whenever a contrary intention on the part of the law-maker is apparent. Where a statute contains a grant of power enumerating certain things which may be done and also a general grant of power which standing alone would include these things and more, the general grant may be given full effect if the context shows that the enumeration was not intended to be exclusive. See for example, *Ford v. United States,* 273 U.S. 593, 611; *Portland v. NET & Co.,* 103 Me. 240, 249; *Grubbe v. Grubbe,* 26 Or. 363, 370; *Swick v. Coleman,* 218 Ill. 33, 40; *Lexington ex rel. V. Commercial Bank,* 130 Mo. App. 687, 692; *McFarland v. M.K.&t. Ry. Co.,* 94 Mo. App. 336, 342.

Applying these principles, we are unable to accept the contention that he

enumeration here in question is exclusive in the face of the general provisions already quoted and particularly of that one which declares that all executive functions are vested directly in the Governor-General or under his supervision and control. It is true that this provision is in the form of a proviso, and it is argued that it is, therefore, nothing more than a definition by negation of the power given to the legislature in the same section. But an analysis of the section, which is reproduced so far as pertinent in the margin* shows, though not wholly beyond doubt, that the power given to the legislature is itself a proviso. In other words, both the grant of power to the legislature and the grant of power to the Governor-General are in form provisos to the general provisions of Sec. 22 which precede them. It is difficult to assign to either provision the general purpose of that form of legislation, which is merely to qualify the operation of the general language which precedes it. We think rather that both provisos are to be construed as independent and substantive provisions. As this Court has more than once pointed out, it is not an uncommon practice in legislative proceedings to include independent pieces of legislation under the head of provisos. See *Georgia Banking Co. V. Smith,* 128 U.S. 174, 181; *White v. United States,* 191 U.S. 545, 551; *Cox v. Hart,* 260 U.S. 427, 435.

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*Sec. 22. That, except as provided otherwise in this Act, the executive departments of the Philippine government shall continue as now authorized by law until otherwise provided by the Philippine Legislature. When the Philippine Legislature herein provided shall convene and organize, the Philippine Commission, as such, shall cease and determine, and the members thereof shall vacate their offices as members of said commission: *Provided,* That the heads of executive departments shall continue to exercise their executive functions until the heads of departments provided by the Philippine Legislature pursuant to the provisions of this Act are appointed and qualified. The Philippine Legislature thereafter may thereafter by appropriate legislation increase the number or abolish any of the executive departments, or make such changes in the names and duties thereof as it may see fit, and shall provide for the appointment and removal of the heads of the executive departments by the Governor-General: *Provided,* That all executive functions of the government must be directly under the Governor General or within one of the executive departments under the supervision and control of the Governor General. . . .

Finally, it is urged that since no action has been taken by Congress under Section 19 of the Organic Act, requiring all laws enacted by the Philippine Legislature to be reported to Congress, which reserves the power to annul them,

the legislation now under review has received the implied sanction of Congress and should not be disturbed. *Clinton v. Englebrecht,* 13 Wall. 434, 446, is cited in support of this contention. In that case jurors were summoned into legislative courts of the territory of Utah under the provisions of acts of Congress applicable only to the courts of the United States. This Court held that the jurors were wrongly summoned and a challenge to the array should have been sustained. The Court, however, proceeded also to examine the jury law enacted by the territorial legislature, and declared it to be valid. In the course of the opinion it was said that since the simple disapproval by Congress at any time would have annulled that law, it was not unreasonable to infer that it was approved by that body. In the later case of *Clayton v. Utah Territory,* 132 U.S. 632, an act of the same territory providing for the appointment of certain officers, was held to be void as in contravention of a provision of the territorial Organic Act vesting in the Governor the power to appoint such officers. Dealing with the same point here made, this Court said (p. 642):

"It is true that in a case of doubtful construction the long acquiescence of Congress and the general government may be resorted to as some evidence of the proper construction, or of the validity, of a law. This principle is more applicable to questions relating to the construction of a statute than to matters which go to the power of the legislature to enact it. At all events, it can hardly be admitted as a general proposition that under the power of Congress reserved in the organic acts of the Territories to annul the acts of their legislatures the absence of any action by Congress is to be construed to be a recognition of the power of legislature to pass laws in conflict with the act of Congress under which they were created."

The inference of an approval by Congress from its mere failure to act at best rests upon a weak foundation. And we think where the inference is sought to be applied, as here, to a case where the legislation is clearly void as in contravention of the Organic Act it cannot reasonably be indulged. To justify the conclusion that Congress has consented to the violation of one of its own acts of such fundamental character, will require something more than such inaction upon its part as really amounts to nothing more than a failure affirmatively to declare such violation by a formal act.

Whether the Philippine Legislature, in view of the alternative form of the provision vesting all executive functions directly under the Governor-General or within one of the executive departments under his supervision and control, might devolve the voting power upon the head of an executive department or an appointee of such head, we do not now decide. The legislature has not undertaken to do so; and in the absence of such an attempt it necessary results

that the power must be exercised directly by the Governor-General or by his appointee, since he is the only executive now definitely authorized by law to act.

The judgments in both cases are *Affirmed.*

MR. JUSTICE HOLMES.

The great ordinances of the Constitution do not establish and divide fields of black and white. Even the more specific of them are found to terminate in a penumbra shading gradually from one extreme to the other. Property must not be taken without compensation, but with the help of a phrase, (the police power) some property may be taken or destroyed for public use without paying for it, if you do not take too much. When we come to the fundamental distinctions it is still more obvious that they must be received with a certain latitude or our government could not go on.

To make a rule of conduct applicable to an individual who but for such action would be free form it is to legislate–yet it is what the judges do whenever they determine which of two competing principles of policy shall prevail. At an early date it was held that Congress could delegate to the Courts the power to regulate process, which certainly is lawmaking so far as it goes. *Wayman v. Southard,* 10 Wheat. 1, 42. *Bank of the United States v. Halstead,* 10 Wheat. 51. With regard to the Executive, Congress has delegated to it or to some branch of it the power to impose penalties, *Oceanic Steam Navigation co. v. Stranahan,* 214 U.S. 320; to make conclusive determination of dutiable values, *Passavant, v. United States,* 148 U.S. 214; to establish standards for imports, *Buttfield v. Stranahan,* 192 U.S. 470; to make regulations as to forest reserves, *United States v. Grimaud,* 220 U.S. 506, and other powers not needing to be stated in further detail. *Houston v. St. Louis Independent Packing Co.,* 240 U.S. 479. *Union Bridge Co. v. United States,* 204 U.S. 364. *Ex parte Kollock,* 165 U.S. 526. Congress has authorized the President to suspend the operation of a statute, even one suspending commercial intercourse with another country, *Field v. Clark,* 143 U.S. 649, and very recently it has been decided that the President might be given power to change the tariff. *J.W. Hampton, Jr. & Co. V. United States,* 276 U.S. 394. It is said that the powers of Congress cannot be delegated, yet Congress has established the Interstate Commerce Commission, which does legislative, judicial and executive acts, only softened by a *quasi;* makes regulations, *Intermountain Rate Cases,* 234 U.S. 476, 486, issues reparation orders, and performs executive functions in connection with Safety Appliance Acts, Boiler Inspection Acts,&c. Congress also has made executive excursions in the other direction. It has withdrawn jurisdiction of a case after it has been argued. *Ex parte McCardle, 7* Wall. 506. It has granted amnesty, notwithstanding the grant of the President of the power to pardon. *Brown v. Walker,* 161 U.S. 591, 601. A territorial

legislature has granted a divorce. *Maynard v. Hill,* 125 U.S. 190. Congress has declared unlawful an obstruction to navigation that this Court has declared unlawful. *Pennsylvania v. Wheeling & Belmont Bridge Co.,* 18 How. 421. Parallel to the case before us, Congress long ago established the Smithsonian Institution, to question which would be to lay hands on the Ark of the Covenant; not to speak of later similar exercises of power hitherto unquestioned, so far as I know.

It does not seem to need argument to show that however we may disguise it by veiling words we do not and cannot carry out the distinction between legislative and executive action with mathematical precision and divide the branches into watertight compartments, were it ever so desirable to do so, which I am far from believing that it is, or that the Constitution requires.

The only qualifications of such latitude as otherwise would be consistent with the threefold division of power is the proviso in Sec. 22 of the organic Act "that all executive functions of the Government must be directly under the Governor General or within one of the executive departments," &c. Act of August 29, 1916, c. 416, 39 Stat. 553, U.S.C., Title 48, Sec. 1114. That does not appear to me to govern the case. The corporations concerned were private corporations which the legislature had power to incorporate. Whoever owned the stock, the corporation did not perform functions of the Government. This would be plain if the stock were in private hands, and if the Government bought the stock from private owners the functions of the corporations would not be changed. If I am right in what I have said I think that ownership would not make voting upon the stock an executive function of the Government when the acts of the corporation were not. I cannot believe that the legislature might not have provided for the holding of the stock by a board of private persons with no duty to the Government other than to keep it informed and to pay over such dividends as might accrue. It is said that the functions of the Board of Control are not legislative or judicial and therefore they must be executive. I should say rather that they plainly are no part of the executive functions of the Government but rather fall into the indiscriminate residue of matters within legislative control. I think it would be lamentable even to hint a doubt as to the legitimacy of the action of Congress in establishing the Smithsonian as it did, and I see no sufficient reason for denying the Philippine legislature a similar power.

MR. JUSTICE BRANDEIS agrees with this opinion.

MR. JUSTICE McREYNOLDS.

I think the opinion of the majority goes much beyond the necessities of the case.

The "Organic Act" is careful to provide: "That all executive functions of the government must be directly under the Governor General or within one of the executive departments under the supervision and control of the Governor General."

A good reason lies behind this limitation which does not apply to our Federal or State governments. From the language employed, read in the light of all the circumstances, perhaps it is possible to spell out enough to overthrow the challenged legislation. Beyond that it is unnecessary to go.

UNITED STATES v. SECURITY-FIRST
NAT. BANK OF LOS ANGELES et al.
Equity No. 838-RJ.

District Court, S.d. California, Central Division. Nov. 20, 1939.

1. Statutes 225-3/4

Where Congress, presumably aware of the judicial construction of a particular statute, subsequently re-enacts the statute without alteration, it is deemed to have placed its approval upon such interpretation, and to have made such judicial construction part of the law itself. Revenue Act, 1924, Sec. 315(a), 43 Stat. 312.

2. Internal revenue 26

The statutory lien of estate tax attaches as of the date of decedent's death to all property in the estate and as against all persons, as against contention that attachment as of date of death is only with respect to the estate itself or beneficiaries, not with respect to bona fide encumbrances for value. Revenue Act 1924, Sec. 315 (a), 43 Stat. 312.

3. Taxation 501, 508, 509

A tax lien can arise but once and can have only one effective ate of beginning, and whether it can prevail over conflicting claims is an entirely different question.

4. Statutes 161(1)

Where no specific reference to prior statute appears in subsequent related statute, court should construe the two acts together, avoiding repugnancies and implied repeals.

5. Internal revenue 26, 28 (1)

There is no limit to the number of remedies which Congress may place at the disposal of the Commissioner of Internal Revenue for enforcement of taxes and Congress may provide one lien to protect rights pending assessment and another to enforce the collection after assessment.

6. Constitutional law 70 (1)

No matter how unfortunate the result may seem through court's refusal to qualify the broad terms of a general statute, the courts must not assume the task

of legislation.

7. Internal revenue 26

Under statute making estate tax lien attach as of the date of death, construed with general statute governing internal revenue tax liens, the estate has burden of clearing itself of estate tax liability, and the lien is good as against subsequent encumbrancers though return was not filed until seven years after death. Revenue Act 1924, Sec. 315 (a), 43 Stat. 312; 26 U.S.C.A. Secs. 1560-1562.

8. Internal revenue 8 (2)

The purpose of the estate tax law was not to regulate the administration of probate estates, but rather to impose a tax on the right to transmit property at death, and hence the manner of handling deceased's estates is controlled by state and not by federal law. Revenue Act 1924, Sec. 315 (a), 43 Stat. 312.

9. Courts 359

Under estate tax statute exempting parts of the gross estate used for payment of charges against estate an expenses of administration allowed by any court having jurisdiction, what constitutes due "approval" by California probate court of expenditures made by California probate court of expenditures made California executor must be determined by California law. Revenue Act 1924, Sec. 315 (a), 43 Stat. 312.

10. Internal revenue 26

Approval of executor's expenditures by California Superior Court having jurisdiction over the estate was sufficient to free property used in making such expenditures from estate tax lien, so long as the expenditures did not amount to distribution, though such approval was not secured until after the expenditures were made. Revenue Act 1924, Sec. 315 (a), 43 Stat. 312.

11. Internal revenue 26

Where proceeds of sale of land included in gross estate were sufficiently traced to show payment of admitted obligations therewith, the land may properly be said to have been used to defray expenses of administration and charges against the estate, so as to be free of estate tax lien. Revenue Act 1924, Sec. 315 (a), 43 Stat. 312.

12. Internal revenue 26

Money loaned on land included in gross estate after notice of lien had been filed under general internal revenue statute was subject to estate tax lien, irrespective of whether such money was within the statutory exception regarding property used for payment of charges against the estate and expenses of administration. Revenue Act 1924, Sec. 315(a), 43 Stat. 312; 26 U.S.C.A. Secs. 1560-1562.

13. Internal revenue 26

The estate tax statute creates an entirely separate and distinct lien from that arising under general internal revenue statute. Revenue Act 1924, Sec. 315(a), 43 Stat. 312; 26 U.S.CA. Secs. 1560 - 1562.

14. Internal revenue 26

Property of gross estate used for expenditures that were never approved by the probate court, including funeral expenses and doctor bills incurred during the last illness, cannot escape statutory lien for gross estate tax. Revenue Act 1924, Sec. 315 (a), 43 Stat. 312.

15. Courts 359

Under statute providing that property used to pay charges against the estate and expenses of administration shall be freed from estate tax lien, but not specifying what constitutes proper expenses and charges and casting the burden of examining correctness of the items upon the state court, state law governs in determining what expenses and charges are proper. Revenue Act 1924, Sec. 315 (a), 43 Stat. 312.

16. Internal revenue 26

Attorneys' fees paid with approval of California Superior Court having jurisdiction of an estate must be considered an "expense of administration," and hence property used to pay such fees was freed from gross estate tax lien. Revenue Act 1924, Sec. 315(a), 43 Stat. 312.

[Ed. Note–For other definitions of "Expenses," see Words & Phrases.]

17. Internal revenue 26

Taxes and assessments, accruing after decedent's death and paid by administratrix with approval of California Superior Court having jurisdiction of the estate, were proper "charges against the estate" and "expenses of the estate," and hence property used to pay such taxes and assessments was freed from estate tax lien. Revenue Act 1924, Sec. 315 (a), 43 Stat. 312.

[Ed. Note.-For other definitions of "Charges Against Estate," see Words & Phrases.]

Actions by the United States of America against the Security-First National Bank of Los Angeles and others, to collect federal estate taxes.

Decree in accordance with opinion.

Ben Harrison, U.S. Atty., E.H. Mitchell, Asst. U.S. Atty., and Eugene Harpole, Sp. Atty. For the Treasury Department, all of Los Angeles, Cal., for the United States.

M.S. Rankin, S.I. Colver, and Milo V. Olson, all of Los Angeles, Cal., for defendants Security-First National Bank of Los Angeles and Los Angeles Trust & Safe Deposit Co.

Arch H. Vernon, Earl E. Johnson, and Gilbert E. Harris, all of Los Angeles, Cal., for defendants title Insurance & Trust Co. And Title Guarantee & Trust Co.

JENNEY, District Judge.

This is an action by the United States of America to collect federal estate taxes and interest thereon, through the enforcement of liens against certain properties alleged to have been acquired from the estate of decedent by defendants, after the government lien had attached.

Decedent, Alla Wheeler Hallett, died February 13, 1926, owning all of the real property involved herein. It is agreed by all parties that the estate was subject to federal estate tax, and that a return should have been filed by February 13, 1927. No return was filed however, until February 2, 1933, nearly seven years after decedent's death. Until the filing of this return, the tax in question was assessed, appearing in the April and June 1933, assessment lists. On August 11, 1933, notice of lien was filed by the Collector of Internal Revenue in Los Angeles County in accordance with the provisions of Section 3186, R.S., 26 U.S.C.A. Sec. 1562.

In the meantime, the estate had borrowed money, securing the same by a deed of trust, upon that part of its property hereinafter referred to as "Parcel I." Default having occurred in repayment of the loan, the deed of trust was foreclosed, and Parcel I was conveyed on December 21, 1937, by trustee's deed to defendant, Title Insurance and Trust Company of Los Angeles.

The legal question first presented in connection with this defendant is this: Did the lien of the government take effect, as against a bona fide encumbrancer for value, as of the date of death, February 13, 1926, or as of the date of recordation, August 11, 1933. If the lien is held to have taken effect at the earlier time, it is conceded that the Government is entitled to prevail over defendant, Title Insurance and Trust Company. If the later date is determined to be controlling, it is conceded that this defendant acquired Parcel I free and clear of the government's lien.

Prior to the recordation of the government's lien, which occurred on August 11, 1933, the estate borrowed additional funds in the amount of $10,000, giving as security therefor a mortgage upon property hereinafter referred to as "Parcel II." The proceeds of this loan are alleged to have been spent for the most part in paying expenses of administration and charges against the estate. The exact amounts so used will be indicated later in this opinion.

Subsequent to the recordation of the Government lien, and on September 4, 1934, this mortgage loan on Parcel II was refinanced and additional funds in the amount of $6,000 were borrowed form defendant Security First-National Bank of Los Angeles, a deed of trust on Parcel II being given as security therefor. These

additional funds, likewise, were allegedly spent to defray expenses of administration and charges against the estate. This latter loan was never repaid, and on January 15, 1937, a sale was had under deed of trust; at which sale Parcel II was bought in by defendant Security-First National Bank.

The general legal issue presented as to defendant Security-First National Bank, is this: Was the bank's property interest, as purchaser at the sale, taken free and clear of the Government lien, because of the use made by the estate of the borrowed funds. Further acts will be developed and the subsidiary issues on the part of the case will be stated later in this opinion.

The court will now consider the first question involved, namely, the liability of the Title Insurance and Trust Company. Section 315 (a) of the Revenue Act of 1924, 43 Stat. 312 (which for all purposes here was the same as Section 209 of the Revenue Act of 1916, 39 Stat. 780 and Section 409 of the Revenue Acts of 1918 and 1921, 40 Stat. 1100 and 42 Stat. 283), provided: "Unless the tax is sooner paid in full, it shall be a lien for ten years upon the gross estate of the decedent, except that such part of the gross estate as is used for the payment of charges against the estate an expenses of its administration, allowed by any court having jurisdiction thereof, shall be divested of such lien. If the Commissioner is satisfied that the tax liability of an estate has been fully discharged or provided for, he may, under regulations prescribed by him with the approval of the Secretary, issue his certificate, releasing any or all property of such estate form the lien herein imposed."

The lien arising thereunder was held by the courts to take effect as of the ate of decedent's death,. *Hertz v. Woodman*, 218 U.S. 205, 223, 30 S.Ct. 621, 54 L.Ed. 1001; *Page v. Skinner* 8 Cir., 298 F. 731, at page 732. This construction was widely recognized and observed.

[1] *United States v. Ayer*, 1 Cir., 12 F. 2d 194, 5 Am.Fed. Tax R. 5935. Congress presumably aware of this judicial construction of its enactment, and having subsequently re-enacted the statute without alteration, is deemed to have placed its approval upon the interpretation given by the courts, and to have made such judicial construction part of the law itself. The *Abbotsford*, 98 U.S. 440, 25 L.Ed. 168; *United States v. Ryan*, 284 U.S. 167, 52 S.Ct., 65, 76 L.Ed. 224; *Helvering v. R.J. Reynolds tobacco Co.*, 306 U.S. 110, 59 S.Ct. 423, 83 L.Ed. 536.

[2,3] Defendant contends that the decision, fixing the time of the attachment of lien as of the date of decedent's death, did so only with respect to the estate itself or the beneficiaries thereof, and did not deal with a sitaution where bona fide encumbrancers for value were involved. There are no authorities cited supporting this contention, and the court feels that it is unsound. The statute is broad and general, and its meaning–that the lien attaches as of the date of

decedent's death–seems clear. To say that this lien attaches at one time as against the estate and beneficiaries (at decedent's death),and at another time as against third parties (perhaps at time of recordation), would ignore the essential nature of liens. A tax lien can arise but once. It can only have one effective date of beginning. (Whether, once it has attached, it can prevail over conflicting claims against the same property is an entirely different question.) Manifestly such a construction would read into the tax statute an unwarranted exception based upon reasons of so-called policy–considerations which are more properly cognizable by the legislature than the courts. Tax laws may not be rewritten by courts simply because they may be dissatisfied with the statutes as drafted by Congress.

This court must hold, therefore, that the lien, arising by virtue of Section 315(a) of the Revenue Act of 1924 attaches as of the date of decedent's death to all property in the estate and as against all persons.

Defendant's next contention is this: Since Sec. 3186 of the Revised Statutes, as amended in 1913, 36 U.S.C.A. 1560-1562, was in effect in 1924 when the Revenue Act here pertinent was passed, Congress must have intended to have Sec. 315 (a) modified by and interpreted in the light of Sec. 3186. Thereby the estate tax lien would be no different from the general tax lien of Sec. 3186–which lien arises when the assessment list is received by the Collector, and is only valid as against a mortgage, purchaser or judgment creditor after due recordation.

[4] Congress, presumed to know the law, undoubtedly had Section 3186 in mind when it passed Section 315(a). Yet no specific reference to the former appears in the latter. Under such circumstances, if possible, it is he duty of a court to construe the two acts together, avoiding repugnancies and implied repeals. See *Penziner v. West American Finance Co.*, 10 Cal.2d 160, at page 176, 74 P.2d 252. Defendant, recognizing this proposition, insists that although Section 315(a) is to be construed as fixing the time its lien arises, that section is silent as to when its lien shall become valid as against mortgagees, purchasers and judgment creditors. Hence, they contend the time fixed by Section 3186–i.e., the date of recordation–must be read into Section 315(a) for the sake of consistency, and both liens would be valid as against bona fide encumbrancers for value only after proper recordation. This construction is urged as one which will prevent "secret liens," a situation which Congress is asserted to have disapproved in 1913, when it amended Section 3186 to eliminate what was theretofore a secret lien, by requiring recordation.

[5] Defendant's argument tacitly assumes that there can be but one lien to enforce a tax in favor of the Government. However, there is no limit to the number of remedies Congress, in its discretion, may place at the disposal of the

Commissioner for the enforcement of taxes. Clearly Congress, with complete propriety, may provide one lien to protect its rights pending the assessment of a tax, and another to enforce the collection thereof, once assessed. In any event, however unwise a secret lien may be, the remarks of the court in *United States v. Curry*, D.C., 201 F. 371, 374, are pertinent to the situation here even as they were when in 1913 the same problem arose before the amendment to Section 3186:

"It would seem that by comparatively slight change of the statute law the rights of the United States could be sufficiently protected without endangering the interests of other persons. The collector of internal revenue at the time he makes demand upon the taxpayer might be required to transmit a copy of the demand to some office in which judgments and other recognized liens upon real estate are recorded and the records of which are consequently carefully examined by conveyancers. Whether public policy does or does not require that section 3186 shall be repealed or amended in some such way as above suggested is a question of policy for Congress. The present state of the law called to its attention at least six years ago. Part 1, Proceedings American Bar Ass'n 1906, p. 598.

"It has, however not taken any action. The courts must enforce the law as they find it."

[6] In our case, Congress could have made the law otherwise. It may yet do so. But at present it seems content to let the clear general terms of Section 315(a), without any exceptions, stand unchanged and as they have read for twenty-three years. No matter how unfortunate the result may seem through the refusal of the court to qualify the broad terms of a general statute, the task of legislation must not be assumed by the courts. *Crooks v. Harrelson*, 282 U.S. 55, at page 60, 51 S.Ct. 49, 75 L. Ed. 156.

Section 315(a), although broad and sweeping affords no proper basis for this court's decision that Congress intended it to be other than broad and sweeping. Merely because some might think it wiser to require recordation of this lien as well as of the lien arising under Sec. 3186, this court is not justified in ruling that Congress intended such a result. It may well be that congress, looking at the question from the standpoint of collecting revenue efficiently, deemed it best to leave section 315(a) unchanged–a broad, unqualified lien law, requiring all persons dealing with estates to investigate at their peril the situation in regard to federal estate taxes. While some estates in the process of liquidation might be handicapped thereby, the law was expressly worded to permit sales of property out of the estate when the tax, though unpaid, had been "provided for." Such a law has the element of certainty to recommend its wisdom, and relieves the Collector of the obligation of scurrying around to notify all who might possibly

be interested parties, of the claims of the Government. Congress may well have deemed such reasons sound.

[7] The law as it now stands, puts the burden upon the estate of clearing itself of estate tax liability–a situation not so unfair as it may seem at first glace. Under he procedure of section 3186, the Collector knows the date of the inception of that lien, since it takes effect as of the ate the assessment list is received at his office. Hence he is able to give notice thereof. Under the provisions of Section 315(a), however, the Collector has no way of learning that a tax is due, short of an extensive investigation, the expense of which Congress apparently did not feel justified in authorizing until some type of return is made by the estate's legal representative. Only then does the Collector learn the facts and the date of decedent's death. In the case at bar, the return was not filed until seven years after decedent's death. Should the Government be bound at its peril to protect its interests during all this period, when it has been kept in ignorance of facts well known to the representatives of the estate and by them revealed to purchasers and encumbrancers dealing with the estate? It is unreasonable for Congress to hesitate to saddle the Government with such a burden? Certainly this statute cannot be judicially revised, when under he circumstances, Congress has definitely placed upon the estate the duty of clearing itself of estate tax liability, or of providing therefor before assets are transferred or encumbered.

However wise or unwise the answer given by Congress to these questions, this court is constrained to say that Congress has answered them, and done so in the active exercise of its legislative functions. Reformation and revision of sweeping tax laws may properly be sought in the legislative halls, but not in the courts. This court, therefore, holds that the lien of the Government attached as of February 13, 1926 to all property in the estate of Alla Wheeler Hallett, and that it is good as against subsequent encumbrancers.

This disposes of the first issue in the case and fixes liability upon all defendants, unless it can be shown that all or part of the property was subsequently transferred free from this lien by virtue of the clause of Section 315(a), exempting from the lien "such part of the gross estate as is used for the payment of charges against the estate and expenses of its administration, allowed by any court having jurisdiction thereof." Counsel for he Government insist that if this exception is to be relied upon, the allowance by the probate court must have preceded the actual expenditure. No statute or case is submitted in support of this contention; nor does Section 315 (a) itself specify the time within which the approval of the court must be secured.

[8,9] the purpose of the estate tax law was not to regulate the administration of probate estates, but rather to impose a tax on the right to transmit property at

death. It is therefore clear that, except for necessary provisions as to measuring and collecting the tax, the manner of handling decedents' estates is controlled by state and not federal law. Congress being silent on the matter, what constitutes due approval by a probate court in California of expenditures made by a California executor must be determined by California law.

In the case at bar, the Government concedes that certain expenditures were approved by the Superior Court of Los Angeles County; that that court had jurisdiction over the estate under California law; that although such approval was not secured until after the sums were dispersed, the approval given was, nevertheless, granted in accordance with the usual procedure in such matters as prescribed in the Probate Code of California and the decisions construing the same.

[10] It, therefore, appears that those expenditures in this case which defendants can show have constituted payment of expenses of administration and charges against the estate, and which were approved by the Superior Court of Los Angeles County, come within the meaning of the exception in Sec. 315(a). This conclusion seems sound so long as the expenditures do not amount to distribution. A decision to the effect that approval must precede payment might impose so much red tape upon legal representatives and courts as to preclude efficient administration of decedents' estates and might swamp the courts with innumerable hearings on trivial matters. The California rule avoids this congestion, and we must follow it, since Congress has indicated no other.

[11] Counsel for the Government point out that it was not the land itself, but only funds raised by encumbering the land , which were actually used to make such payments. The court however, finds from an examination of the stipulation of agreed facts, and the supplement thereto, that proceeds from the sale of the land have been sufficiently traced through the bank account of the estate to show payment of various admitted obligations, so that, applying the well-established principles of equitable conversion, the land may, with propriety, be said to have been used to defray expenses of administration and charges against the estate. *In re Sanford,* 188 Iowa 833, 175 N.W. 506; *Land title & Trust Co. V. South Carolina Tax Comm'n,* 131 S.C. 192, 126 S.E. 189, 42 A.L.R. 417; *Coleman's Estate,* 159 Pa. 231, 28 A. 137; *Shoenberger's Estate,* 221 Pa 112, 70 a. 579, 19 L.r. A.,N.s., 290, 128 Am.St.Rep. 737.